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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 40 OF THE COVENANT

Initial reports of States parties due in 1993

Addendum

UNITED STATES OF AMERICA*

[29 July 1994]

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Introduction

1. The U.S. Constitution is the central instrument of American government and the supreme law of the land. For over 200 years it has guided the evolution of governmental institutions and has provided the basis for political stability, individual freedom, economic growth and social progress. It contains specific guarantees of the most important rights and freedoms necessary to a democratic society. These rights are principally found in the Bill of Rights, which consists of the first 10 amendments to the Constitution, adopted in 1791, only 2 years after the Constitution itself was approved. They include, among others, freedom of religion, speech, press, and assembly, the right to trial by jury, and a prohibition on unreasonable searches and seizures. Other significant protections have been added by subsequent amendments. Many of these rights parallel those addressed in the International Covenant on Civil and Political Rights. While originally formulated as limitations on the authority of the federal government, these protections have to a great extent been interpreted over time to apply against all forms of government action, including the governments and officials of the 50 constituent states and subordinate governmental entities. The Constitution thus provides binding and effective standards of human rights protection against actions of all levels of government throughout the nation.

2. The Constitution was designed to protect the people against the abuse of authority by distributing the power of the federal government among three separate but co-equal branches (the executive, the legislative and the judicial). Each branch was given specific responsibilities and prerogatives as well as a certain ability to limit or counter the authority of the other two branches. This system of "checks and balances" serves as a guarantee against potential excesses by any one branch.

3. Moreover, the federal government established by the Constitution is a government of limited authority and responsibility. Those powers not delegated to the federal government were specifically reserved to the states and the people. The resulting division of authority, which characterizes the federal system in the United States means that state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power. The prerogatives of the states in this regard are so well established that even two neighbouring states frequently have widely varying laws and practices on the same subjects. Some areas covered by the Covenant fall into this category.

4. For this reason, and because article 50 expressly extends the provisions of the Covenant to all parts of federal states, the United States included in its instrument of ratification an understanding to the effect that the U.S. will carry out its obligations thereunder in a manner consistent with the federal nature of its form of government. More precisely, the understanding states:

> "That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein

> and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant."

This provision is not a reservation and does not modify or limit the international obligations of the United States under the Covenant. Rather, it addresses the essentially domestic issue of how the Covenant will be implemented within the U.S. federal system. It serves to emphasize domestically that there was no intent to alter the constitutional balance of authority between the federal government on the one hand and the state and local governments on the other, or to use the provisions of the Covenant to federalize matters now within the competence of the states. It also serves to notify other States Parties that the United States will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.

5. Although there is a growing body of federal criminal law and procedure, criminal law is still largely a matter of state competence, and the precise rules, procedures and punishments vary from state to state. In all states, however, as well as at the federal level, criminal law and procedure must meet the minimum standards provided by the U.S. Constitution, and those standards apply to all individuals regardless of nationality or citizenship.

6. State constitutions and laws also limit the actions of state and local governmental units and officials in order to secure individual rights. State and local officials must always meet the basic federal constitutional standards. In addition, they must comply with the applicable state and local law, which in many instances provides even greater protection to the individual. Because of the large number of such provisions, this report emphasizes the common federal standards with occasional reference to some state and local provisions.

7. The rights protected by the Covenant are, for the most part, guaranteed by the U.S. Constitution and federal statutes. The U.S. Constitution applies to the actions of officials at all levels of government. Some federal laws control only the actions of federal officials and agencies; others apply generally to federal, state and local officials. The differences will be noted where relevant to the discussion of specific articles.

8. In ratifying the Covenant, the United States declared "[T]he provisions of Articles 1 through 27 are not self-executing". This declaration did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts. As indicated throughout this report, however, the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on

those bases. For this reason it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. In some cases, it was considered necessary to take a substantive reservation to specific provisions of the Covenant, or to clarify the interpretation given to a provision through adoption of an understanding. These reservations and understandings are discussed in the following text under the articles to which they refer.

IMPLEMENTATION OF SPECIFIC PROVISIONS OF THE COVENANT

Article 1 - Self-determination

9. The basic principle of self-determination is at the core of American political life, as the nation was born in a struggle against the colonial regime of the British during the eighteenth century. The right to self-determination, set forth in article 1 of the Covenant, is reflected in Article IV, Section 4 of the U.S. Constitution, which obliges the federal government to guarantee to every State a "Republican Form of Government". Implicitly, this article ensures that every state will be governed by popularly elected officials. Similarly, Articles I and II of the Constitution, as amended by the Twelfth, Seventeenth, Twentieth, Twenty-second, and Twenty-third Amendments to the Constitution, and the second clause of the Fourteenth Amendment, describe in detail the manner by which the national government is to be elected. The right to vote in federal, state, and local elections is also implicit, for it is the "essence of a democratic society". Reynolds v. Sims, 377 U.S. 533, 555 (1964). The states are permitted to set the qualifications for voting, but the states are limited by the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments from restricting the franchise on the basis of race, colour, previous condition of servitude, sex, failure to pay a poll tax, or for being under any age except 18 years. Hence, the people of the United States are free in law and in practice to determine their "political status" within the structure of the Constitution, and to change the Constitution itself through amendment. There have been 27 such amendments since the founding of the Republic, beginning with the Bill of Rights (Amendments I-X) in 1791.

10. The right to pursue economic and cultural development is not mentioned, in such terms, in the U.S. Constitution, yet it is among the most fundamental principles that define American society. The essential civil and political rights guaranteed by the Constitution and the Covenant, and a free market economy, provide the basis for free and liberal pursuit of economic or cultural development, with virtually no restraint save for those necessary to protect public safety and welfare.

11. Property rights are specifically protected by the Fifth and Fourteenth Amendments, which guarantee that neither the states nor the federal government may deprive one of property without due process or take property for public use without fair compensation. The Constitution does not, however, protect persons or corporations from reasonable economic regulation by both the states and the federal government. Cultural life, on the other hand, is generally protected by the First Amendment guarantees of freedom of speech and association which are very broadly construed, as discussed below in connection with Articles 18, 19, 21 and 22.

The Insular Areas

12. The United States includes a number of Insular Areas, each of which is unique and constitutes an integral part of the U.S. political family. Persons born in these areas are U.S. citizens (U.S. nationals in the case of American Samoa). Local residents, including U.S. citizens born elsewhere who have moved to these areas, elect their own local governments and make and are ruled by their own local laws. They are free to move to other parts of the United States and enjoy the protections for individual liberty that the Bill of Rights guarantees to all Americans. Guam, the Virgin Islands, American Samoa and Puerto Rico each are represented in the U.S. House of Representatives by an elected delegate. Other than the right to vote on the final passage of a bill or resolution, the delegate from each Insular Area enjoys the same privileges and exercises the same powers as a member of Congress from one of the states.

13. The United States considers Guam, the U.S. Virgin Islands, and American Samoa as still "non-self-governing" for purposes of Article 73 of the Charter of the United Nations. Although these areas are in fact self-governing at the local level, as described below, they have not yet completed the process of achieving self-determination. By contrast, the States of Alaska and Hawaii, as well as the Commonwealth of Puerto Rico, all of which used to be "non-self-governing" for purposes of Article 73, have completed acts of self-determination through which they have resolved the terms of their respective relationships with the rest of the United States. Similarly, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia and the Republic of the Marshall Islands, all of which were once part of the Trust Territory of the Pacific Islands, have completed the process of self-determination.

14. **The Commonwealth of Puerto Rico**. The largest and most populous of the U.S. Insular Areas, Puerto Rico was acquired by the United States in 1899 after the Spanish-American War. Between 1900 and 1950, Congress provided for the governance of Puerto Rico through Organic Acts. In 1950, Congress enacted legislation which authorized Puerto Rico to organize its own government and adopt a constitution. Puerto Rico did so, and its constitution became effective on 25 July 1952, at which time Puerto Rico achieved the status of a Commonwealth of the United States. Since then, the question of Puerto Rico's relationship to the United States has continued to be a matter of public debate and discussion. Most recently, the people of Puerto Rico expressed their views in a public referendum in November 1993; continuation of the current commonwealth arrangement received the greatest support, although nearly as many votes were cast in favour of statehood. By contrast, a small minority of some 5 per cent chose independence.

15. **Guam**. Guam was acquired by the United States in 1899 after the Spanish-American War and, with the exception of the period of occupation during the Second World War, was administered by the Navy until 1950. In 1950, Congress enacted the Guam Organic Act, providing for the civil government of Guam. 48 U.S.C. sections 1421-1425. It includes a Bill of Rights that parallels the guarantees of individual liberty in the Constitution and it grants U.S. citizenship to the people of Guam. Since 1968, the executive branch of Guam's Government, consisting of the Governor and the

Lieutenant Governor, have been popularly elected. Legislative authority is exercised by a unicameral legislature of 21 members elected every two years. Judicial power is vested in local Guamanian courts and in the U.S. District Court for Guam.

16. **The U.S. Virgin Islands**. The U.S. States Virgin Islands were purchased from Denmark in 1916. They are governed in accordance with an Organic Act that Congress enacted in 1936 and revised in 1954. Both the Organic Act and the revised Organic Act included a Bill of Rights paralleling U.S. constitutional protections for individual rights. The people of the Virgin Islands have been U.S. citizens since 1927. Since 1968, the Governor and the Lieutenant Governor have been popularly elected. Legislative power is vested in a unicameral legislature composed of 15 senators elected every 2 years. Judicial power is vested in a local court system and in the U.S. District Court for the Virgin Islands.

17. **American Samoa**. The United States acquired American Samoa through Deeds of Cession executed by its Chiefs in 1900 and 1904 and ratified by Congress in 1929. Unlike the situation with Guam and the Virgin Islands, Congress has not enacted an Organic Act for American Samoa. Instead, it provided for the delegation of executive authority to the Secretary of the Interior. In 1967, the Secretary approved the constitution of American Samoa, which provides for the functioning of its local government. A subsequent federal statute, 48 U.S.C. section 1662a, prohibits any amendments or modification to the constitution without the consent of Congress. The constitution of American Samoa includes a Bill of Rights that substantially parallels the Bill of Rights in the U.S. Constitution.

18. Residents of American Samoa are U.S. nationals. A "national of the United States" is (1) a citizen of the United States or (2) "a person, who though not a citizen of the United States owes permanent allegiance to the United States". Immigration and Naturalization Act, section 101 (a)(22), 8 U.S.C. section 1101 (a)(22). Only the inhabitants of American Samoa and Swains Island are non-citizen nationals. A U.S. national is not an alien. "The term 'alien' means any person not a citizen or national of the United States." INA section 101 (a)(3), 8 U.S.C. section 1101 (a)(3). A non-citizen national who becomes a resident of any state and is otherwise eligible may become a citizen. INA section 325, 8 U.S.C. section 1436.

19. The Governor and Lieutenant Governor of American Samoa have been popularly elected since 1978. Legislative powers of the American Samoa are vested in a bicameral body known as the Fono. The judiciary consists of a system of local courts and of the High Court of American Samoa. The Chief Justice and Associate Justice of the High Court are appointed by the Secretary of the Interior. There is no federal court with general jurisdiction over American Samoa. American Samoa has tended to oppose the establishment of a federal court due to concern that it could have a negative impact on certain aspects of traditional Samoan culture, known as Fa'a Samoa, such as communal land ownership patterns.

20. **The Commonwealth of the Northern Mariana Islands**. At one time a component of the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands (CNMI) elected to become part of the

United States political family through a Covenant enacted in 1976. In accordance with the Covenant, the CNMI adopced a constitution which became effective in 1978. The Covenant and the constitution incorporate the protections of the U.S. Bill of Rights and guarantee U.S. citizenship for residents of the CNMI.

21. Under its constitution, the CNMI is governed by a popularly elected Governor, Lieutenant Governor, and bicameral legislature. Judicial power is vested in the CNMI's local court system and in the U.S. District Court for the Northern Mariana Islands. The CNMI is represented in Washington, D.C. by a popularly elected Resident Representative to the United States. The Resident Representative serves a four-year term but is not a member of Congress.

22. **The Trust Territory of the Pacific Islands**. In 1947, following the Second World War, the United States entered into a Trusteeship Agreement with the United Nations Security Council under which the United States was designated trustee of more than 2,100 islands in the Western Pacific formerly subject to the Japanese mandate. Over time, the Trust Territory of the Pacific Islands (TTPI) was divided into four geographically distinct areas: the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia, and Palau.

23. As discussed above, the Northern Mariana Islands chose in 1976 to become a Commonwealth of the United States. The Marshall Islands and the Federated States of Micronesia each chose to become independent, sovereign nations in a relationship of free association with the United States. In December 1990, they became States Members of the United Nations. Thus, the sole remaining entity of the Trust Territory is the Republic of Palau.

24. Palau is still subject to the United Nations Trusteeship Agreement, and accordingly, it continues to be governed under the authority of the Secretary of the Interior of the United States. Under the constitution of Palau and pursuant to the Secretary's Order No. 3142 of 15 October 1990, the Secretary has delegated executive, legislative, and judicial authority to the local government of Palau. The United States recognized the constitution and government of Palau in 1980. The government consists of a popularly elected President and Vice President, a bicameral legislature known as the OEK, and a local judicial system. A body known as the Council of Chiefs advises the President on matters concerning traditional law and custom. Palau is composed of 16 states, each of which has its own local government and constitution.

25. In 1986, the government of Palau and the Government of the United States signed a Compact of Free Association, which was enacted into law by the U.S. Congress in the same year. The Compact was ratified by the people of Palau in a plebiscite in November 1993, which should soon lead to the termination of the Trusteeship and independence for Palau.

Native Americans

26. **Introduction**. The United States is home to a wide variety of indigenous people or groups who, despite their ethnic, cultural and linguistic diversity, are generally referred to as Native Americans. Many are organized as tribes, some of which have obtained official recognition by the federal government

while others have not. For purposes of this report, the term also includes special status groups such as Alaska Natives and native Hawaiians. The term "Alaska Natives" includes Inuits (sometimes referred to as Eskimos), Indians, and Aleuts. Native Hawaiians are not a federally recognized Indian tribe or group. The lifestyles of Native Americans vary widely, from those in which traditional culture is still largely practised (over 100,000 Native Americans still speak their native languages) to those who have been largely or completely assimilated into urban modernity.

27. In the 1990 census, 1.9 million individuals, or less than 1 per cent of the population, identified themselves as Native Americans. The largest tribes or ethnic groups among these self-identified Native Americans were the Cherokee, Navajo, native Hawaiians, Chippewa and Sioux. The states with the largest Native American populations include Oklahoma, California, Arizona, Hawaii and New Mexico. The highest proportion of Native Americans to the rest of the population occurs in Alaska (15.6 per cent). Approximately half of the total Native American population lives on or near a reservation. The largest land-holding tribes are the Navajo (whose land is located in Arizona, New Mexico and Utah and covers an area larger than 9 of the 50 states), Tohono O'odham, Pine Ridge, Cheyenne River, and San Carlos. In total, Native American tribes and individuals own between 50 and 60 million acres of land. In addition, Alaskan natives own another 44 million acres of land as a result of the Alaska Native Claims Settlement Act.

28. Of all Native American tribes, 542 are federally recognized, including 223 Alaska villages and regional tribes. The term "tribe" here refers to the political and institutional mechanisms of tribal authorities which exercise jurisdiction over reservation or other tribal lands. The members of a tribe, as individuals, are U.S. citizens with the same rights as other U.S. citizens and may live where they choose. Within the area of tribal jurisdiction, however, the tribe itself generally is the governing authority and not a state or other local government. Tribes enjoy considerable autonomy even with respect to the federal government. Federally recognized tribes are eligible to participate in specified programmes funded and administered by the Bureau of Indian Affairs (BIA) in the Department of the Interior. Since 1978, 150 groups have notified the BIA of the intention to seek federal recognition. As of mid-1994, 73 groups had submitted letters of intent to petition; 26 petitions were incomplete; 9 petitions were under active consideration; 5 were ready for active consideration; 7 required legislation; and 30 had been resolved (9 acknowledged as tribes; 13 denied; 5 legislatively determined; and 3 otherwise addressed).

29. The Alaska Native Claims Settlement Act identified 44 million Alaskan acres as Native controlled and owned, and extinguished Natives' claims to most of the rest of Alaska. Native Hawaiians have sought ownership and control over land and acknowledgement of Native American status for some time but without success.

30. Under U.S. law, Native American tribes are distinct, independent political communities, which retain all aspects of their sovereignty not withdrawn by treaty or statute or by implication as a result of their status. See United States v. Wheeler, 435 U.S. 313 (1978); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). Perhaps the

most fundamental principle of the law governing the relationship between the United States and Native American tribes is the principle that the powers vested in Native American tribes are inherent powers of a limited sovereignty which has never been extinguished. They are not, in general, delegated powers granted by acts of Congress.

31. Although Native American tribes are currently accorded a substantial measure of autonomy and self-governance, there are still many areas of difficulty and controversy in their relationships with federal and state governments. Despite some improvements, Native Americans are far more likely to live in poverty and suffer high rates of disease, suicide and homicide than the majority of U.S. citizens. According to the 1990 census, 31 per cent of Native Americans lived below the poverty level. In 1991 the unemployment rate for Native Americans was 45 per cent. Native Americans experience disproportionately high rates of mortality from tuberculosis, alcoholism, accidents, diabetes, homicide, suicide, pneumonia and influenza.

32. **Historical background**. Some scholars have estimated the Native American population of the United States to have been as high as 10 million persons at the time of initial European contact. The basis of indigenous social and political organization was tribal. Tribes ranged from small semi-nomadic bands to large, highly organized and sophisticated communities. Tribes were self-governing entities with clearly understood socio-political rankings or hierarchies. They had systems of social and political control to perform or regulate subsistence and economic activity (including trading with other tribes), distribute wealth, recognize land boundaries, conduct war and regulate domestic and other aspects of intragroup relations.

33. The organizers of government of the United States recognized the self-governance of Indian groups. The Constitution vests in the federal government the exclusive authority to regulate commerce with Native American tribes. Art. 1, section 8, cl. 3. The First Congress acted promptly to exercise this authority, enacting the Indian Trade and Intercourse Act of 1790, 1 Stat. 137. Further, President Washington and the First Congress reached agreement that the treaty-making power of the federal government extended to treaties with Native American tribes, establishing the precedent that Native American treaties - like those with foreign nations - needed Senate approval before they could take effect.

34. As the largely European immigrant population of the United States increased and moved westward, there was increasing tension and violence between settlers and Native Americans. Opting to resolve the situation by accommodating the settlers, the federal government between 1815 and 1845 sought to remove eastern tribes from their tribal homelands. However, with the continued westward push of immigrant settlement, further removal became impossible. In the 1850s, the federal government adopted a new policy of assignment of tribes to permanent reservations. Reservations were intended to be for the exclusive use of Native Americans, providing a fixed and permanent home under the superintendence of a tribal agent. Comm'r of Indian Affairs Annual Rept., S. Exec. Doc. No. 1, 33d Cong., 2d Sess. 225 (1854). Confinement to reservations was often strenuously opposed by tribes, leading to a series of military conflicts that extended through the 1870s.

35. By 1880, there were serious doubts about the reservation policy. Economically and socially, most reservations were not successful. There was widespread destitution in tribal country and significant corruption in the administration of the federal Native American service. Political reformers came to favour allotment of land to individual Indians as a response to these problems and as the vehicle to assimilate Indians into mainstream society. Economic interests in the western states supported allotment because it promised to open additional land to settlement.

36. In 1887, the General Allotment Act authorized the Secretary of the Interior to allot tracts of reservation land to individual Native Americans - 80 acres (approximately 32.3 hectares) to an individual and 160 acres (64.7 hectares) to a family. The allotted land was to be held in trust by the United States for a period of 25 years; thereafter a fee patent was to be issued. Consistent with the philosophy underlying the allotment policy, legislative and administrative policies accompanying allotment strongly discouraged tribal self-government and traditional cultural and religious practices.

37. The General Allotment Act and subsequent allotment legislation resulted in a significant diminution of Native American land holdings. Of 40 million acres allotted to individuals, some 27 million acres were lost by sale or foreclosure between 1887 and 1934. An additional 60 million acres were sold to non-Native American homesteaders or corporations as "surplus" or were ceded outright. In total, Native American land holdings declined from 138 million acres in 1887 to 48 million acres in 1934.

38. In 1934, the policies of assimilation and allotment were rejected with the enactment by Congress of the Indian Reorganization Act (IRA). See 25 U.S.C. sections 461-479. The overriding purpose of the Act was to establish "machinery whereby Indian tribes would be able to assume greater self-government, both politically and economically". Morton v. Mancari, 417 U.S. 535, 542 (1974). The IRA took a community-based approach to preservation of a tribal land base and reorganization of tribal governments. The Act stopped allotment and contained provisions to stabilize tribal land holdings and for the acquisition in trust of additional trust lands for Native American reservations. It provided that tribes could organize for their common welfare, adopt constitutions and by-laws, and form tribal corporations, with the power to own, hold, manage, and operate property and businesses.

39. However, in the late 1940s, federal policy shifted again, with congressional and executive reports proposing renewed policies of assimilation. In 1953, House Concurrent Resolution 108 declared as congressional policy the termination of federal control and supervision over Native American tribes and the freeing of tribes and their members "from all disabilities and limitations specially applicable to Indians". The Indian Reorganization Act was not repealed, but individual acts were passed to implement the new policy for individual tribes or groups of tribes. Specific arrangements varied from tribe to tribe, but these acts typically required tribal approval before the sale or encumbrance of tribal land. For most purposes, the federal trust relationship was ended for terminated tribes, and

tribes and their individual members were made subject to state jurisdiction. Eligibility for special federal services for tribes and tribal members was ended.

40. The impact of termination on these tribes was devastating. Tribes often went from prosperity to poverty. Many terminated tribes saw their land sold. The termination act stripped tribes of their exemption from taxation, and tribal leaders were forced to begin to sell ancestral tribal land to pay the taxes. By the 1960s, many tribes faced the loss of their land, tribal identity, and culture.

41. By 1970, however, national policy had shifted once again, this time toward a goal of tribal self-determination. The new policy was first articulated in a 1970 message to Congress by President Nixon. The message called for rejection of the extremes of both termination and excessive tribal dependence on the federal government. The message said that the "time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions" and proposed a new policy of self-determination "to strengthen the Indian's sense of autonomy without threatening his sense of community". H.Doc. 91-363, 91st Cong., 2d Sess. 1-3 (1970). This new policy found expression in the Indian Self-Determination Act, discussed below.

42. **Current policy**. Current policy continues and builds upon this policy of tribal "self-determination" as expressed by President Clinton on 29 April 1994, in a meeting with tribal leaders. The President signed two memoranda: one instructing all government agencies to cooperate wherever possible in meeting the need for eagle feathers in the traditional practices of Native Americans, and the other directing federal agencies to ensure that they interact with tribes on a government-to-government basis.

43. In terms of legal status, Native American tribes are recognized as "unique aggregations possessing attributes of sovereignty over both their members and their territory". United States v. Mazurie, 419 U.S. 544, 557 (1974). "The sovereignty that Indian tribes retain is of a unique and limited character ... . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status (i.e., by virtue of their being within and part of the United States)." United States v. Wheeler, 435 U.S. 313, 323 (1977).

44. In recent decisions, the U.S. Supreme Court has recognized the inherent right of tribes to tax non-Native Americans doing business within their territories, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), and the immunity of Native Americans and their property from state taxation, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), and Bryan v. Itasca County, 426 U.S. 373 (1976). The Supreme Court has also upheld the right of tribal courts to make the initial determinations as to the scope of their own jurisdiction. National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985).

45. The Supreme Court has recognized that, as a general rule, states lack authority to exercise their civil, regulatory laws on Native American

territory. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). A tribe's authority to regulate land use within the boundaries of its territories has been found to vary depending on the character of the territory. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); South Dakota v. Bourland, 113 S.Ct. 2309 (1993). As a guiding principle for these decisions, the Supreme Court has stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation". Montana v. United States, 450 U.S. 544, 564 (1981).

46. The Supreme Court has held that tribal courts are the proper forum for the adjudication of civil disputes involving Native Americans and non-Native Americans arising on a reservation. Fisher v. District Court, 424 U.S. 382 (1976). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty", and, as a result, "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute". Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

47. In the area of criminal jurisdiction, Congress during the 1950s gave several of the states authority to exercise concurrent jurisdiction on Indian reservations. 18 U.S.C. section 1162; 28 U.S.C. section 1360. In 1968 Congress limited the tribal exercise of criminal jurisdiction to misdemeanours. 25 U.S.C. section 1302(7). The Supreme Court subsequently concluded that tribes do not have criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). It also concluded that tribes do not have criminal jurisdiction over non-member Indians. Duro v. Reina, 495 U.S. 676 (1990). In 1990, however, Congress effectively reversed the Duro decision, recognizing the unique nature of the Indian communities. See Act of 5 November 1990, 104 Stat. 1893; Act of 9 October 1991, 105 Stat 616; Act of 28 October 1991, 105 Stat. 646.

48. **Indian Self-Determination Act**. In the 1970 message on Indian policy mentioned above, then-President Nixon called for legislation to allow tribes to take over control and operation of federally funded and administered Indian programmes from the Department of the Interior and what is now the Department of Health and Human Services. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEA), 25 U.S.C. sections 450, et seq. The Act declares it to be the policy of the United States to assure "maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities". 25 U.S.C. section 450a(a).

49. The ISDA directs the Secretaries of the Interior and Health and Human Services to enter into contracts or grants with Indian tribes and organizations to plan, conduct, or administer programmes that the Secretaries are authorized to administer for the benefit of Indians. Contracts designated as mature contracts may be for an indefinite term, and reporting requirements are minimal. The Act specifically provides that it neither affects the sovereign immunity of Indian tribes nor requires the termination of any

existing trust responsibility of the United States with respect to Indian people. In 1991, the Bureau of Indian Affairs within the Department of the Interior (BIA) distributed $481,228,608 to 414 Indian tribal contractors under the provisions of the ISDA.

50. **Self-Governance Demonstration Project**. In 1988 amendments to the ISDA, Congress established a Self-Governance Research and Demonstration Project involving 20 Indian tribes. Title III, Pub. L. No. 100-472, 102 Stat. 2296 (1988). The purpose of the Self-Governance Project is to allow tribes greater flexibility in administering their own programmes and services with minimal federal governmental involvement. The participant tribes sign a self-governance compact with the government and are allowed to redesign BIA programmes and redistribute funding according to tribal priorities. The tribes in the demonstration programme operate BIA programmes with only limited requirements to adhere to federal regulations and record-keeping requirements. In December 1991, Congress increased to 30 the number of tribes eligible to participate in the Self-Governance Project and extended the demonstration period from 1993 to 1996. Pub. L. No. 102-184, 105 Stat. 1278 (1991). Congress is currently considering legislation to make the project permanent.

51. **Recognition of tribes**. After the abandonment of the termination policy in the 1960s and 1970s, the federal relationship with many of the "terminated" tribes was restored, beginning with the Menominee Tribe in 1973. Menominee Restoration Act, 25 U.S.C. section 903-903f. During the same period, there was a growing awareness of, and interest among, other groups of Indian descendants not formally recognized as tribes by the federal government in asserting their tribal status, tribal treaty rights, or tribal land claims. Many groups of these Indian descendants sought recognition from the federal government.

52. In 1978, the Department of the Interior established a programme within the Bureau of Indian Affairs to standardize the recognition process and provide substantive criteria for determining whether a group of Indian descendants existed as an Indian tribe. Previously, such determinations had been made on an ad hoc basis. The programme included an effort to identify all groups interested in petitioning to establish their tribal status. The effort ultimately identified 150 groups of Indian descendants with an interest in establishing tribal status.

53. The acknowledgement process requires documentation of specific criteria including that the group has been viewed as Indian since historical times, lives in community, and exercises political authority over its members. Thus far, the status of 30 groups has been resolved either by the Department of the Interior or through special legislation.

54. **Indian natural resources**. Indian tribes retain considerable control over natural resources and wealth, with some added protection by the federal government through the establishment of a trust. The federal trust responsibility to the Indian tribes has its roots in the assertion by the federal government that it has the power to control the sale of Indian land to non-Indians. The policy was first asserted by Great Britain in the Royal Proclamation of 1763, which stated that only the Crown could take lands from the Indians. The policy continued after independence in the Indian Trade and

Intercourse Act, passed by the First Congress in 1790 and is now codified in 25 U.S.C. section 177. The courts have held that along with the power to control the disposition of the land comes the responsibility to manage the land for the benefit of the Indian owners and with the same care and skill that a person of ordinary prudence would exercise in dealing with his or her own property. United States v. Mason, 412 U.S. 391, 398 (1973).

55. The United States also has a more general trust relationship with the Indian people, United States v. Mitchell, 463 U.S. 206, 225 (1983) (Mitchell II), and that relationship creates an overriding duty to deal fairly with all Indians. Morton v. Ruiz, 415 U.S. 199, 236 (1974). The trust obligation is a strict fiduciary standard that applies to all departments of the government that deal with Indians, not just the departments specifically charged with responsibility for Indian affairs. If Indians believe the government is not acting in accordance with its trust responsibilities, they may seek injunctive relief from the courts to compel the government to perform its duties or, if damage has already occurred, they may obtain damages through a breach of trust action. Mitchell II, 463 U.S. at 226-28.

56. Land. According to a 1990 Bureau of Indian Affairs report, tribes and individual Native Americans own between 50 and 60 million acres of trust or restricted land. This represents 2.34 per cent of the total land base in the United States. Federal law specifically prohibits the alienation of tribal trust lands absent the consent of the federal government. 25 U.S.C. section 177. It is the intent of the statutory restraint on alienation of Native American lands to insulate such lands from the full impact of market forces, preserving the land base for the furtherance of Native American values. Inherent in this federal policy is the view that preservation of a substantial land base is essential to the existence of tribal society and culture.

57. Prior to the 1930s, federal policies had the effect of diminishing the Native American land base. As indicated above, between 1887 and 1934 Native American land holdings declined from 138 million acres to 48 million acres. However, the 1934 Indian Reorganization Act contained provisions to stabilize the Indian land base. More recently, the Congress enacted the Indian Land Consolidation Act of 1983 to assist tribes in addressing the allotment policy. 25 U.S.C. sections 2201-11. The Act authorizes tribes to establish land consolidation areas where tribes are assisted in acquiring and exchanging land in order to consolidate their holdings. The Act also provided that especially small fractionated interests in allotted land owned by individuals do not pass to the owners' heirs, but return to the tribe upon the death of those individuals. This latter provision of the Act was found to violate the constitutional rights of Native American landowners in Hodel v. Irving, 481 U.S. 704 (1987). The Act has been amended to address this decision, but constitutional challenges to the amended Act are currently pending in the courts.

58. Enforcement of land rights against third parties. Federal law has attempted to protect tribal possessory rights against intrusion by third parties by restraining and punishing various types of trespass. Ordinary trespass remedies are available to Native American tribes to prevent trespasses upon their land and to recover damages for injuries arising out of

such trespasses. Accordingly, actions may be maintained for ejectment, for injunctions against intrusions and to recover damages for trespass on, or injury to, tribal lands. See Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985).

59. Possessory suits or damage actions involving tribal possessory rights may be commenced either by the tribe itself or by the federal government acting on behalf of the tribe. Basically these claims allege that (i) the affected tribe has a superior property interest in the subject land (i.e. aboriginal or recognized title), (ii) the Non-intercourse Act provides that no transfer of tribal lands is valid unless approved by the federal government, (iii) subsequent to the Act certain tribal lands were conveyed to third parties without specific governmental approval, (iv) these conveyances are in violation of the Act and thus, invalid, and (v) the affected tribe is now entitled, despite the passage of time, to return of the land and/or to damages for trespasses committed by those who wrongfully occupied the land. Oneida County, supra.

60. In instances where the federal government has been requested but has been unwilling to take action on behalf of the tribe, the courts have been willing to order the commencement of a possessory action on the theory that the federal trusteeship over Native American lands created by the statutory restraints on alienation imposes an affirmative obligation to protect Indian possessory rights. In tribal possessory actions commenced directly by the tribe, the tribe may assert any and all positions, claims, and defences that would have been available had the suit been commenced by the federal government. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

61. **Indian land rights claims against the United States.** The great bulk of aboriginal Native American land in what is now the United States passed out of indigenous ownership before 1890 by cession pursuant to treaty or taking by the federal government. The right of Native Americans to obtain compensation for or recovery of this land differs from their rights against third parties.

62. Aboriginal Indian interest in land derives from the fact that the various tribes occupied and exercised sovereignty over lands at the time of occupation by white people. This interest does not depend upon formal recognition of the aboriginal title, and gives the tribes the right to occupy and possess the land. Aboriginal title gives a tribe the right to possess land as against third parties until and unless Congress specifically extinguishes the right.

63. Congress may recognize or extinguish aboriginal rights. Once aboriginal rights are recognized by Congress, then the tribe has title that cannot be extinguished without a clear and specific action by Congress in a treaty, statute or executive order, and compensation for the extinguishment of the right. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941). However, by law, Congress is not obligated to pay compensation to the tribes when it extinguishes aboriginal Indian rights that have not been recognized by Congress. See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

64. Despite this legal doctrine, compensation has in fact been paid by the United States for many Indian land cessions at the time they were made, although the compensation often has been less than adequate. In this century, additional provision has been made for cases in which no or inadequate compensation was paid. In the first half of the twentieth century, special jurisdictional statutes gave some tribes the right to sue in the Court of Claims for compensation for land taking. In 1946, Congress adopted the Indian Claims Commission Act, 25 U.S.C. sections 70, et seq., which provided for a quasi-judicial body, the Indian Claims Commission (ICC), to open up unresolved Indian claims against the United States, a large portion of which involved claims for taken lands. The Act authorized claims "arising from the taking by the United States, whether as a result of a Treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant", as well as claims "not recognized by any existing rule of law or equity" based on general principles of fair and honourable dealings. 25 U.S.C. section 70a.

65. The ICC provided a forum for suits against the United States Government that would otherwise have been barred by time and sovereign immunity, and in some respects provided Indians with special benefits that would not ordinarily have been available under regular court rules and procedures. Recovery of compensation did not depend on proof of recognized title; compensation was available even if a tribe's property interest was aboriginal only. Further, compensation was available if a tribe's interest in land was found to have been taken for less than adequate compensation. However, the wording of the Act and its legislative history made clear that only financial compensation was contemplated by Congress; the ICC had no authority to restore land rights that had been extinguished. Osage Nation v. United States, 1 Indian Claims Commission 54 (1948), reversed on other grounds, 119 Ct.Cl. 592, cert. denied, 342 U.S. 896 (1951).

66. Water. Generally, Indian water rights are based on the federal or Indian reserved rights legal doctrine first enunciated by the U.S. Supreme Court in Winters v. United States, 207 U.S. 564 (1908). Winters held that the establishment of an Indian reservation includes an implicit reservation of water necessary to provide a permanent home for Indians. The holding followed the recognized rule that treaties are not grants of rights to Indians, but grants of rights from them and a reservation of those rights not granted. United States v. Winans, 198 U.S. 371, 381 (1905). In Winters, the Supreme Court recognized that in establishing reservations, not only did the United States reserve water for Indians, but the Indians themselves also reserved their aboriginal right to "command of the lands and water". 207 U.S. at 576.

67. Indian reserved water rights differ from water rights held by non-Indians under state law in a number of key respects. For example, Indian water rights are not based on the amount of water a tribe has historically put to use or "appropriated". Rather, the quantity of water that a tribe is entitled to is an amount sufficient to carry out the purpose of making the reservation a permanent home base for Indian people. Included within this measure is water for domestic, commercial, industrial, recreational, hunting and fishing, and agricultural purposes. The water right is broad enough "to satisfy the future as well as the present needs of the Indian[s]". Arizona v. California,

373 U.S. 546, 600 (1963). Another unique aspect of an Indian reserved water right is that it is not forfeited through non-use, so that a tribe's water rights are protected from usurpation by its non-Indian neighbours during those periods of time when the tribe is unable, because of economic or other constraints, to use its water.

68. **Hunting and fishing rights**. Through international treaties and domestic legislation, Congress and the executive branch have sought to ensure conservation of wildlife yet recognize the essential rights of Indians to hunt and fish to maintain their culture. In the contiguous 48 states where Indian tribes had reserved hunting and fishing rights in treaties, litigation in federal court provided the primary means of protecting Indian hunting and fishing rights. In the early 1970s, the United States initiated litigation against the states of Washington, Oregon, and Michigan to define and protect from state regulation the treaty fishing rights of many tribes. The cases have recognized legitimate conservation needs but, at the same time, by protecting the tribes' right to regulate the fishery free of state controls, the litigation has done a great deal to preserve and enhance fundamental tribal rights.

69. In addition to U.S. Government participation in hunting and fishing rights litigation on behalf of the tribes, the BIA has provided tribes with funding to support the tribes' own litigation and funding to develop their own fish and game management capabilities and resources. Congress has enacted legislation to make the income derived from treaty fishing tax exempt thereby providing some measure of economic protection to preserve the cultural activity of treaty fishing.

70. In Alaska, although aboriginal hunting and fishing rights were extinguished, certain statutory provisions exempt Alaska Natives from many wildlife management statutes and mandate a subsistence priority for rural Alaskans.

71. **Minerals**. Decisions of the U.S. Supreme Court in the 1930s established that the minerals in, on, or under Indian-owned land were constituent elements of the land and thus owned by the Indians who own the land. United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); British-American Oil Prod. Co. v. Board of Equalization, 299 U.S. 159, 164-65 (1936). Minerals currently being produced are primarily oil, gas, and coal. Other minerals known to exist on Indian lands include shale, gilsonite, uranium, gypsum, helium, copper, iron, zinc, lead, phosphate, asbestos, and bentonite. Mineral resources in, on, or under lands owned by any individual Indian or Alaska Native or any Indian tribe, the title to which is held in trust by the United States or subject to a restraint on alienation imposed by the United States, are subject to development and disposition under statutes and regulations of the United States. These statutes and regulations provide that while the individual Indian or Indian tribe is the lessor, the Secretary of the Interior must approve the lease or other minerals agreement before it is effective. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 372 (1968); Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1459 (9th Cir. 1986). The regulations are detailed and cover items such as durational requirements, rental and royalty rates, acreage restrictions, environmental requirements, and operating requirements. See 25 C.F.R. Part 211 (Leasing of Tribal Lands for Mining);

25 C.F.R. Part 212 (Leasing of Allotted Lands for Mining). Under this comprehensive system of statutes and regulations applicable to Indian mineral resources, the United States has a fiduciary obligation toward Indians with respect to management of Indian mineral resources. Pawnee v. United States, 830 F.2d 187, 190 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1987); Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986).

72. Indian mineral resources can be developed under two different statutory schemes. The first is a leasing system where the individual Indian or Indian tribe may lease its mineral resource to a developer. 25 U.S.C. sections 396-396g. The second statutory scheme was established in 1982 with the enactment of the Indian Mineral Development Act, codified at 25 U.S.C. sections 2101-08. The purpose of that Act was to allow Indian tribes to enter into various kinds of agreements for the development of their mineral resources. Tribes wishing to have greater responsibility, oversight, and flexibility in the control and development of their own mineral resources can negotiate innovative, flexible business arrangements under the Act. The tribes are not limited to the leases and the restrictions on leasing that are present under the 1938 leasing statute.

73. Under either statutory scheme, Indian lands are not treated as federal public lands for purposes of mineral regulation. The principal goal of the Department of the Interior in Indian mineral resource management is not to further federal energy policies, but rather to assist Indian landowners in deriving maximum economic benefit from their resources consistent with sound conservation, environmental, and cultural practices.

74. Timber. Indian tribes have full equitable ownership in timber located on tribal reservation lands. United States v. Algoma Lumber Co., 305 U.S. 415, 420 (1939). The question of tribal ownership of timber resources was unresolved until the 1938 decision of the U.S. Supreme Court in United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938), which held that timber was a constituent element of the land and owned by the tribe unless the treaty with the tribe specified otherwise.

75. Individual Indians and Indian tribes generally may not sell the timber on their land without the approval of the Secretary of the Interior. The U.S. Congress authorized the sale of standing timber in 1910. 25 U.S.C. sections 406, 407. Under these statutes, timber may be sold in accordance with regulations promulgated by the Secretary of the Interior found at 25 C.F.R. Part 163. The regulations state that the objectives with respect to management of Indian forest lands are to preserve commercial forest lands in a perpetually productive state, develop a sales programme supported by written tribal objectives and a long-range multiple use plan, develop resources for jobs and income, regulate water runoff and soil erosion, and preserve wildlife, recreational, cultural, aesthetic, and traditional values. 25 C.F.R. section 163.3. In Mitchell v. United States, 463 U.S. 206 (1983), these statutes and regulations were held to create a fiduciary relationship between the government and Indian timber owners.

76. In 1990, the U.S. Congress declared that the United States has a trust responsibility toward Indian forest lands when it passed the National Indian

Forest Resources Management Act. 25 U.S.C. section 3101-20. The Act reaffirmed the existing Native American forest land management objectives and established some new programme directions. The purposes of the Act are to allow both the Department of the Interior and the Native Americans to participate in the management of Indian forest lands in a manner consistent with the Secretary's trust responsibility and with the objectives of the Indian owners; to provide educational and training opportunities to increase the number of Indians working in forestry programmes on Indian lands; and to authorize the necessary appropriations to carry out the protection, conservation, utilization, management, and enhancement of Indian forest lands objectives of the Act.

Article 2 - Equal protection of rights in the Covenant

77. As a general principle, all individuals within the United States are afforded the enjoyment of the rights enumerated in the International Covenant on Civil and Political Rights as a matter of law without regard to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Judicial interpretation of the guarantees in the U.S. Constitution has led to the development of an extensive body of decisional law covering a broad spectrum of governmental activity according to a number of well-accepted canons. The right of individuals to challenge governmental actions in court, and the power of the judiciary to invalidate those actions that fail to meet the constitutional standards, provides an effective method for ensuring equal protection of the law in practice. In addition, a number of significant anti-discrimination statutes provide additional protection for the civil and political rights of persons within the United States. While the remainder of this section of the report addresses domestic law regarding the principle of equal protection, the United States is none the less committed to the international principle of equal protection and is actively moving toward ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

78. **Equal protection**. Most of the substantive rights enumerated in the Covenant have exact or nearly exact analogues in the U.S. Constitution, as is discussed more fully in those portions of this report dealing with each of the 26 articles. In addition, and of particular relevance to article 2, the Constitution guarantees "equal protection" to all. This principle derives from the Fourteenth Amendment's guarantee that no state may "deny to any person within its jurisdiction the equal protection of the laws", and the Fifth Amendment's guarantee that "no person shall be deprived of life, liberty, or property, without due process of law", which has been read to incorporate an "equal protection" component. Bolling v. Sharpe, 347 U.S. 497 (1954). These constitutional provisions limit the power of government with respect to all persons subject to U.S. jurisdiction. As interpreted and applied by the U.S. Supreme Court, the doctrine of equal protection applies not only with respect to the rights protected by the Covenant, but also to the provision of government services and benefits such as education, employment and housing.

79. The substantive guarantees of the Constitution are often implemented without reference to equal protection. For example, the Supreme Court recently held that a local government could not constitutionally prohibit animal sacrifices that are part of a religious ritual, although the government could pass neutral laws to protect animals from torture, or to protect public health. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1993). While the group that practises the sacrifices may be identifiable racially and ethnically, the case was decided squarely under the First Amendment protection of religious freedom. The Court did not discuss the issues in terms of ethnic non-discrimination and equal protection.

80. **Classifications**. Under the doctrine of equal protection, it has long been recognized that the government must treat persons who are "similarly situated" on an equal basis, but can treat persons in different situations or classes in different ways with respect to a permissible state purpose. The general rule is that legislative classifications are presumed valid if they bear some reasonable relation to a legitimate governmental purpose. McGowan v. Maryland, 366 U.S. 420, 425-36 (1961). The most obvious example is economic regulation. Both state and federal governments are able to apply different rules to different types of economic activities, and the courts will review such regulation under a very deferential standard. See, e.g. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Similarly, the way in which a state government chooses to allocate its financial resources among categories of needy people will be reviewed under a very deferential standard. Dandridge v. Williams, 397 U.S. 471 (1970).

81. **Suspect classifications**. On the other hand, certain distinctions or classifications have been recognized as inherently invidious and therefore have been subjected to more exacting scrutiny and judged against more stringent requirements. For example, classification on the basis of racial distinctions is automatically "suspect" and must be justified as necessary to a compelling governmental purpose. Korematsu v. United States, 323 U.S. 214 (1944); Brown v. Board of Education, 347 U.S. 483 (1954); McLaughlin v. Florida, 379 U.S. 184 (1961); Loving v. Virginia, 388 U.S. 1 (1967). Laws which purposely discriminate against racial minorities, whether in the fields of housing, voting, employment, education or other areas, have rarely been upheld under this higher standard. When intentional discrimination on the basis of race or national origin can be inferred from a legislative scheme or discerned in legislative history, it is as forbidden as overt use of a racial classification. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948). Unlawful intentional discrimination has sometimes been inferred simply from the impact of a law. For example, in Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Supreme Court found impermissible discrimination where all of some 200 Chinese applicants were denied permits to operate laundries while virtually all non-Chinese applicants were granted permits under the same statute.

82. In addition to distinctions based on race, colour and national origin, distinctions based on gender, illegitimacy and alienage have all been accorded special status under the Equal Protection clauses, though legislative classifications of the last three types are typically less difficult to justify than classifications by race, colour, or national origin. For

example, in Craig v. Boren, 429 U.S. 190 (1976), the Court stated that classifications by gender must "substantially further important government objectives", and struck down a state statute setting a higher drinking age for men than women. In Levy v. Louisiana, 391 U.S. 68 (1968), the Court held that a state statute that did not permit illegitimate children to sue for wrongful death was "invidiously" discriminatory because there was no link between the children's illegitimacy and the alleged wrong to their mother. And in Graham v. Richardson, 403 U.S. 365 (1971), the Court struck down state statutes denying welfare benefits to resident aliens and to aliens who had not resided in the state for 15 years.

83. By contrast, the courts have not read the Constitution's Equal Protection clauses to require compelling justifications for classifications based on property or economic status, San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); age, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); or disability, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). Thus, distinctions based on such characteristics will be assessed against less stringent standards but may still be found to violate the equal protection doctrine when not rationally related to a legitimate governmental purpose. Disability and age discrimination have also been addressed by statute, as discussed below.

84. **Fundamental interest**. Where a so-called "fundamental interest" is at stake, the Supreme Court has subjected legislative classifications to "strict scrutiny" despite the absence of a suspect classification. This explains why, in the cases involving the right to vote (including fair apportionment) and the due process cases (right to counsel, etc.), the Court has found invidious discrimination even though the basis for that discrimination is not race, national origin, sex, or any other suspect class. What makes a right "fundamental" is not always clear. The fundamental rights are not necessarily those found in other provisions of the Constitution; indeed, those other rights can be protected without reference to equal protection. More likely, the rights are the ones not found in the Constitution except by inference, such as the right to procreation. See Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of persons convicted of grand larceny but not embezzlers).

85. **Corrective or affirmative action**. In recent years, the question has frequently arisen whether legislation may classify by race for purposes of compensating for past racial discrimination. The general rule that has evolved is that because race is a "suspect classification", in this context as in all others, it will be subject to "strict scrutiny" by the courts. City of Richmond v. Croson, 488 U.S. 469 (1989). However, where an employer or other entity has engaged in racial discrimination in the past, it will generally be permitted (and may sometimes be required) to accord narrowly tailored racial preferences for a limited period of time, to correct the effects of its past conduct. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). Greater latitude for racially based remedies has been permitted when Congress has acted under the enabling clause of the Fourteenth Amendment than when states or political subdivisions have given a racial preference. See, e.g. Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding congressionally mandated set-aside of percentage of federal grant to be spent through minority contractors).

86. **Specific issues**. Although, as noted above, issues of discrimination involving rights protected by the Covenant are often addressed through suits to vindicate a constitutional right other than equal protection, equal protection has sometimes been invoked directly in connection with certain guarantees specified in the Covenant, such as the following:

(a) Poverty and due process. The Fifth and Fourteenth Amendments assure "due process of law" as well as "equal protection of the law". Obviously, economic status can affect the right to a fair trial and a reasonably effective appeal. In this area, courts have weighed the essentiality of certain elements of the justice system and, on occasion, found it a denial of equal protection for the state to fail to pay for the necessary assistance - e.g., to provide counsel, Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); and transcripts Griffin v. Illinois, 351 U.S. 12 (1956). Similarly, the Supreme Court has held that a person's probation cannot be revoked merely because he is unable to pay restitution, Bearden v. Georgia, 461 U.S. 660 (1983). All states and the federal government have mechanisms for providing legal counsel to indigent defendants in the criminal process;

(b) Race and due process. Even in the nineteenth century it was clear that racial discrimination in jury selection affected the due process rights of African Americans, Strauder v. West Virginia, 100 U.S. 303 (1879). Reading the Equal Protection clauses in conjunction with the constitutional guarantee of Due Process, the Supreme Court has repeatedly held that it is a violation to discriminate in preparation of jury lists on the basis of race or national origin, Neal v. Delaware, 103 U.S. 370 (1880); Hernandez v. Texas, 347 U.S. 475 (1954). That prohibition has been extended to the exercise of peremptory challenges in petit jury selection, Batson v. Kentucky, 476 U.S. 79 (1986), and, most recently, to peremptory challenges on the basis of sex, J.E.B. v. Alabama Ex Rel. T.B., 62 U.S.L.W. 4219 (April 19, 1994). While that prohibition has not been extended to encompass other statuses (e.g. low-income), a separate line of cases has interpreted the Sixth Amendment right to a fair trial and a jury of one's peers to encompass a right to be tried by a jury drawn from a venire from which no "identifiable group" has been systematically excluded. Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968). Moreover, the Court has recognized that the potential jurors also have a cognizable right not to be discriminated against. Carter v. Jury Comm'n of Greene County, 39 U.S. 320 (1970); Georgia v. McCollum, 112 S.Ct. 2348 (1992);

(c) Race and the death penalty. Legal attacks on the death penalty have generally been based on the Eighth Amendment's prohibition of cruel and unusual punishment. In recent years, however, there have been efforts to demonstrate that in operation, the death penalty is unequally applied on the basis of race. Numerous defendants have attempted, so far without success, to show that the discretionary elements in the process of sentencing a defendant to death have had the effect of discrimination by race of defendant or race of victim. See McCleskey v. Kemp, 481 U.S. 279 (1987) (where petitioner could not demonstrate that he personally had been discriminated against, statistics suggesting systemic inequities could not be used to

overturn death sentence). This issue is also the subject of considerable public debate and political consideration and is currently under study in the U.S. Congress;

(d) Race and the right to form families. The Supreme Court has relied upon the Equal Protection Clause to invalidate state bans on intermarriage, Loving v. Virginia, 388 U.S. 1 (1967), and to prevent courts dealing in child custody from implementing societal prejudices, Palmore v. Sidoti, 466 U.S. 429 (1984).

87. **State action**. Operating alone, the constitutional Equal Protection clauses protect one only against discriminatory treatment by a government entity, or by persons acting "under colour of law". Thus, the doctrine does not reach purely private conduct in which there is no governmental involvement. Whether or not in any particular situation there is sufficient "state action" to bring a discriminatory practice under the constitutional Equal Protection clauses represents a complicated jurisprudence in its own right. See, e.g. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

88. **Federal statutes**. Congress has supplemented the constitutional guarantees of equal protection to encompass certain private actions by exercising its powers under the "commerce clause" and under the "enabling" clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments. After the Civil War, Congress implemented the Thirteenth Amendment by passing laws prohibiting private racial discrimination in property and contractual relationships. 42 U.S.C. sections 1981 and 1982. Most of the federal civil rights laws were passed in and after 1964 on the basis of the commerce clause as well as the post-Civil War amendments. These statutes prohibit discrimination in areas beyond those covered by the Covenant, including privately owned public accommodations, private and federal, state or local governmental employment, federally assisted programmes, and private and public housing. Where the statutes cover ground already protected by the Constitution, they add remedies that did not exist before. Moreover, these statutes prohibit discrimination on the basis of statuses other than, and in addition to, the ones protected under the Equal Protection clauses of the Constitution. Thus, in addition to race, colour, national origin, and sex (in most instances), these statutes include religion (but not in federally assisted programmes), age, familial status (housing only) and disability.

89. Virtually every federal agency is involved in promoting or enforcing equal protection guarantees. Although the federal civil rights statutes and implementing regulations are too numerous to provide an exhaustive list, some of the principal statutes are described below. Because these statutes were passed at different times to address different problems, no two cover precisely the same ground. For example, Title II of the Civil Rights Act of 1964, prohibiting discrimination in places of public accommodation and amusement (hotels, restaurants, cinemas) does not mention "sex" as a protected category. Title II, moreover, does not protect against discrimination by race in ordinary retail stores. On the other hand, the Americans with Disabilities Act, passed in 1990, requires that retail stores as well as places of public amusement be accessible to persons with disabilities. Some of the gaps in coverage are filled in by state and local constitutions, laws, and ordinances.

90. Title VI of the Civil Rights Act of 1964, 42 U.S.C. sections 2000d et seq., prohibits discrimination on the basis of race, colour, or national origin in programmes or activities receiving federal financial assistance. Title IX of the Education Amendments of 1972, 20 U.S.C. sections 1681 et seq., and implementing regulations at 34 C.F.R. Part 106, prohibits discrimination on the basis of sex in federally funded education programmes or activities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, prohibits discrimination on the basis of disability in programmes or activities receiving federal financial assistance. The Age Discrimination Act of 1975, 42 U.S.C. sections 6101-7, prohibits discrimination on the basis of age in programmes or activities receiving federal financial assistance.

91. Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e et seq., prohibits public and private employers (with certain exceptions including the federal government and small private businesses) from discriminating on the basis of race, colour, religion, sex or national origin in their employment practices. The Age Discrimination in Employment Act of 1967, 29 U.S.C. sections 621 et seq., similarly bars discrimination in employment on the basis of age.

92. Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. section 793, requires employers with federal contracts or subcontracts of more than $10,000 to take affirmative action to employ and advance in employment qualified individuals with disabilities. Executive Order 11246, as amended, prohibits most federal contractors and subcontractors and federally assisted contractors and subcontractors from discriminating in employment decisions on the basis of race, colour, sex, religion or national origin. The Vietnam-Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. section 4212, requires that employers with federal contracts or subcontracts of $10,000 or more provide equal opportunity and affirmative action for Vietnam-era veterans and certain disabled veterans of all wars. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. sections 12101 et seq., bars discrimination in employment practices by employers (with exceptions similar to those under Title VII, supra) against qualified individuals with disabilities. The ADA also requires that steps be taken to make "public entities" such as public transit, and "public accommodations", which includes many private commercial establishments, accessible to disabled individuals.

93. The Fair Housing Act, 42 U.S.C. section 3601 et seq., and implementing regulations at 24 C.F.R. Parts 100-125, prohibits discrimination based on race, colour, religion, sex, national origin, handicap and familial status in activities relating to the sale, rental, financing and advertising of housing and in the provision of services and facilities in connection with housing. The Act applies both to public and private housing and defines "familial status" to include one or more persons under the age of 18 being domiciled with a parent or other person having legal custody of such individual or individuals.

94. Additionally, many federal agencies administer programmes designed to enhance opportunities for women, minorities, and other groups. For example, the U.S. Department of Education administers grant programmes designed to encourage and assist the participation of minorities and women in elementary, secondary and higher education programmes. These include bilingual education

programmes, magnet schools, desegregation assistance centres, women's educational equity programmes, financial aid for students who are minorities or women, and grants to strengthen historically African-American colleges and universities. The U.S. Department of Labor monitors and enforces compliance with the non-discrimination provisions applicable to federal contractors and apprenticeship programmes, including affirmative action programmes for women and minorities, and promotes the placement of Native Americans with federal contractors.

95. **Aliens**. Under U.S. immigration law, an alien is "any person not a citizen or national of the United States". See 8 U.S.C. section 1101(a)(3). Aliens living in the United States, even though not U.S. citizens, generally enjoy the constitutional and Covenant rights and protections of citizens, including the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery; the right to liberty and security of person; the right to humane treatment for persons deprived of their liberty; freedom from imprisonment for breach of contractual obligation; freedom of movement; the right to fair trial; prohibition of ex post facto laws; recognition as a person under the law; freedom from arbitrary interference with privacy, family and home in the United States; freedom of thought, conscience and religion; freedom of opinion and expression; freedom of assembly; and freedom of association. "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments", Plyer v. Doe, 457 U.S. 202, 210 (1982); see also Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (resident aliens are persons within the protection of the Fifth Amendment and may not be deprived of life, liberty or property without due process); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (aliens accused of a crime are entitled to Fifth and Sixth Amendment rights).

96. Aliens enjoy equal protection rights as well, but distinctions between illegal aliens and others do not require as strong justifications as distinctions between citizens and aliens lawfully in the United States. Distinctions between resident aliens and citizens require more justification, but not the compelling state interests required for distinctions based on race. The longer an alien has been in the United States and the more legitimate the alien's immigration status, the more equivalent the alien's equal protection rights are to those of a U.S. citizen. Consistent with article 25 of the Covenant, aliens are generally precluded from voting or holding federal elective office. A number of federal statutes, some of which are discussed above, prohibit national origin discrimination in various contexts.

97. **State Constitutions**. Roughly 27 states currently have "equal protection clauses" in their constitutions. Unlike the Fourteenth Amendment to the United States Constitution, the state equal protection guarantees often incorporate other rights by reference. For example, the Connecticut clause (constitution, art. I, sect. 20) provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, colour, ancestry, national origin, or sex". Whether the "civil or political rights" are restricted, under this kind of clause, to

rights enumerated elsewhere in the state constitution, depends upon the state judiciary's interpretation. As a practical matter, the Fourteenth Amendment provides a minimum below which no state can go in according equal protection. The states can extend but not contract what the federal Constitution demands.

98. Remedies. U.S. law provides extensive remedies and avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights, including:

(a) A person claiming to have been denied a constitutional or, in some instances, a statutory right, may bring a civil action in federal court under 42 U.S.C. section 1983, which states:

> "Every person who, under colour of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

Only "state actions" or actions "under colour of state law" are subject to section 1983. These include actions by federal, state and local officials. Some officials, however, are subject to absolute or qualified immunity. Judges, for example, enjoy absolute immunity. Bradley v. Fisher, 80 U.S. 335 (1872). Other officials enjoy qualified immunity, which is designed to protect the discretion of officials in the exercise of their official functions. Qualified immunity will not be afforded, however, if the officials violated clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). While prosecutors enjoy absolute immunity from suit for their involvement in the judicial phase of the criminal process, they are afforded only qualified immunity for law enforcement functions. Burns v. Reed, 500 U.S. 478 (1991). The Fourteenth Amendment's Due Process and Equal Protection clauses, as well as other constitutional rights, are enforced under section 1983 in hundreds of federal suits every year. The most common relief under section 1983 is damages, subject only to rules about official immunity. Injunctive relief is also available and widely used as relief under this provision. All states have judicial procedures by which official action may be challenged, though the procedure may go by various names (such as "petition for review");

(b) Federal officials may be sued directly under provisions of the Constitution, subject only to doctrines of immunity. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979);

(c) Conspiracies to deny civil rights, apart from being subject to criminal prosecution, may be attacked civilly under 42 U.S.C. section 1985. However, where the right is one enumerated in the Constitution as being secured only from "state action", there must be official actors in the

conspiracy, or it cannot be reached under that statute. Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825 (1983);

(d) Section 2 of the Voting Rights Act of 1965, as amended, may be enforced by a private suit to vindicate denials of Fifteenth Amendment rights, i.e. intentional denials or limitations on the right to vote or to exercise an effective vote. (See the discussion under art. 25.);

(e) Where Congress has so provided, the federal government, through the Attorney General, may bring civil actions to enjoin acts or patterns of conduct that violate some constitutional rights. Thus, as indicated below, the Attorney General can sue under the Civil Rights of Institutionalized Persons Act to vindicate the rights of persons involuntarily committed to prisons, jails, hospitals, and institutions for the mentally retarded. Similarly, section 2 of the Voting Rights Act of 1965, as amended, authorizes the Attorney General to bring suit to vindicate the right to vote without discrimination based on race;

(f) A person whose alleged injury resembles one actionable at common law (such as the deprivation of life addressed by art. 6) may sue the United States for damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. section 1346(b), 2671 et seq., or sue the states under analogous state statutes. The FTCA waives the sovereign immunity of the United States with respect to certain torts. "Discretionary" acts, and many "intentional" torts are not included, but the Act does waive the sovereign immunity of the United States with respect to claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution based on the acts or omissions of "investigative or law enforcement officers" of the U.S. Government. The Act defines "investigative or law enforcement officer" as an officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law; this definition may include Department of Defense personnel being used in a law enforcement capacity;

(g) Any person prosecuted under a statute or in conjunction with a governmental scheme (such as jury selection) which he or she believes to be unconstitutional may challenge that statute as part of the defence. This may be done in the context of federal or state prosecutions. Even in civil actions, the defendant may pose a constitutional challenge to the statute that forms the basis of the suit. Any court, from the lowest to the United States Supreme Court, may consider such a claim of unconstitutionality, though normally it must be raised at the earliest opportunity to be considered at all. The United States Supreme Court has the discretion to review nearly all cases coming from the lower federal courts or from the states' highest courts;

(h) Detention pursuant to a statute believed to be unconstitutional or as a result of a procedure that allegedly violated a constitutional right may be challenged by a writ of habeas corpus in state and/or federal court. To a limited degree, post-conviction relief is also available by state and federal writs of habeas corpus or, in the case of federal convictions, by a motion for relief from a sentence (see 28 U.S.C. section 2241-55). All states have similar remedies as part of their criminal procedure;

(i) The federal government may prosecute criminally the violations of some civil rights. Section 241 of Title 18, U.S. Code, prohibits conspiracies to interfere with rights secured to all inhabitants of the United States by the Constitution, by federal laws, and by federal court decisions interpreting both of them. Section 242 of Title 18 prohibits any act "under colour of law" that interferes with a protected right. Abuse of police power, denying rights guaranteed by the Bill of Rights but most often denials of due process, can be reached under these statutes, subject to doctrines of immunity. The government may also bring criminal prosecutions for use of force or threat of force to violate a person's rights under the 1964 Civil Rights Act. 18 U.S.C. section 245;

(j) In addition to the remedies discussed above, federal, state and local officials, as well as private persons, who violate the rights of others may be subject to prosecution under a host of generic federal and state criminal statutes (see, for example, the discussion under art. 6). U.S. Department of Defense personnel may also be subject to criminal prosecution under the Uniform Code of Military Justice (10 U.S.C. section 801-946) of the U.S. Code.

99. **Publicity and education**. People in the United States are very aware of their rights. As discussed in Part I, the text of the Covenant, as well as its legislative history in the United States and numerous commentaries, are available to any interested person through libraries, congressional and other publications and computer databases. Throughout the United States, students at all levels receive extensive instruction in fundamental civil and political rights. The federal government has sent copies of the Covenant to the attorneys general of each state and constituent unit in the United States, with the request that they be further distributed to all relevant officials, and U.S. government officials have participated in a number of public presentations highlighting the significance of U.S. ratification. This report will be widely distributed by the U.S. Government, bar associations, and human rights organizations.

100. **U.S. understandings**. Despite the strength and breadth of the equal protection guarantees afforded all individuals under the Constitution and the various federal and state statutory schemes, the prohibitions against non-discrimination in U.S. law are not open-ended. Discrimination is prohibited only for specific statuses, and there are exceptions which allow for distinctions. For example, even under the generally protective Age Discrimination Act of 1975, 42 U.S.C. section 6101-07, age may be taken into account in certain circumstances. In addition, U.S. law permits additional distinctions, such as between citizens and non-citizens and between different categories of non-citizens, especially in the context of the immigration laws. Noting that the Human Rights Committee itself has acknowledged, in General Comment 18, that not all differentiation of treatment constitutes discrimination, the United States felt it appropriate to state clearly, through an understanding included in its instrument of ratification:

> "That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective."

In addition, the United States stated its understanding that the prohibition in paragraph 1 of article 4 upon discrimination in time of emergency based "solely" on status of race, colour, sex, language, religion or social origin does not prohibit distinctions that may have a disproportionate effect upon persons of a particular status.

Article 3 - Equal rights of men and women

101. **Constitutional protections**. The rights enumerated in the Covenant and provided by U.S. law are guaranteed equally to men and women in the United States. With the adoption in 1920 of the Nineteenth Amendment, which guaranteed women the right to vote, the principal constitutional impediment to the equality of men and women was eliminated. Over the past 30 years, women in the United States have made significant strides at gaining social and economic equality with men, although further progress needs to be made.

102. As discussed under article 2, the U.S. Constitution explicitly guarantees men and women equality before the law through the Equal Protection and Due Process clauses of the Fourteenth and Fifth Amendments. As interpreted by the U.S. Supreme Court, these provisions prohibit both the federal government and the states from arbitrarily or irrationally discriminating on the basis of gender. For example, the Supreme Court has declared unconstitutional a state law giving preference to males over females in the appointment of administrators for the estates of individuals who have died intestate. Reed v. Reed, 404 U.S. 71 (1971). The Court found that the preference constituted the "very kind of arbitrary choice forbidden in the Equal Protection Clause". Id. at 76.

103. The legal standard by which the U.S. Supreme Court has judged gender distinctions has evolved over time. One year after the Reed decision, the court ruled that denying benefits for the husbands of women in the military, while providing them to the wives of similarly situated men in the military, violated the Fifth Amendment. Frontiero v. Richardson, 411 U.S. 677 (1973). The following year, however, the Court upheld a sex-based distinction in a law that provided a benefit - a property tax exemption - for widows but not for similarly situated widowers. Kahn v. Shevin, 416 U.S. 351 (1974). The Court found that the distinction was permissible because it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden". Id. at 355.

104. In Craig v. Boren, 429 U.S. 190 (1976), the Court articulated the standard which has governed the field of gender distinctions ever since: "To withstand constitutional challenge ... classifications by gender must serve important governmental objectives and must be substantially related to

achievement of those objectives". 429 U.S. at 197. See also, Taylor v. Louisiana, 419 U.S. 522 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

105. It is virtually certain that the Supreme Court would strike down any significant distinction between men and women in the enjoyment of the civil and political rights secured by the Covenant, either under the substantive right involved or as a matter of equal protection.

106. **Equal Rights Amendment (ERA)**. An amendment to the U.S. Constitution to introduce a separate Equal Protection clause specifically addressing gender equality was first proposed in 1923 and thereafter in subsequent Congresses. In 1972, the Equal Rights Amendment (ERA) passed the U.S. Congress. However, in the succeeding 10 years, an insufficient number of states ratified the measure, and it accordingly expired in 1982. None the less, to date 16 states have adopted the ERA as part of their state constitutions. Most of the state ERA's provide simply that "[e]quality of rights under the law shall not be denied or abridged by the state on account of sex". See, e.g. Colorado, article II, section 29; Hawaii, article I, section 3; Illinois, article I, section 18; Maryland, DR 46; New Mexico, article II, section 18. Other states have added the ERA provision to their broader constitutional equal protection clauses. For example, the Alaska Constitution provides that "[n]o person is to be denied the enjoyment of any civil or political right because of race, colour, creed, sex, or national origin". Alaska article I, section 3. See also, Connecticut, article I, section 20 and Massachusetts, article LVI.

107. **Federal statutes and programmes**. Many federal civil rights statutes and programmes including those discussed under article 2 address discrimination on the basis of sex.

108. **Justice Department review**. Beginning in 1976, the U.S. Department of Justice conducted a review of federal statutes and regulations and of the policies, practices and procedures of federal agencies in order to identify provisions that discriminated on the basis of gender. See Final Report of the Attorney General to the President and Domestic Policy Council Pursuant to E.O. 12336 (April 1986). Most of the statutory provisions identified were not substantively discriminatory, and the majority of the others had little practical impact. For example, 14 U.S.C. sections 371-73 provided that only "male citizens" could be designated as aviation cadets in the U.S. Coast Guard. Although the statute was technically in effect, the aviation cadet programme to which it applied was no longer operated. The few statutes that did have significant sex-based distinctions were subject to challenge on constitutional grounds as discussed above. See, e.g. Califano v. Goldfarb, 430 U.S. 199 (1977).

109. **Family law**. Family law, discussed in detail with respect to articles 23 and 24, is an area which currently invites substantial debate over gender equality. In that field, women have historically been discriminated against in terms of the inequity which has persisted in the marital relationship and in divorce and custody settlements. Women still bear the majority of responsibility for child-rearing both within and outside of the marriage setting, and often are unable to enforce child-support orders or alimony awards, resulting in poverty or extreme hardship. However, the 1970s ushered

in a movement of sweeping reforms, resulting in far more equitable marital property, alimony, and child custody laws. These reforms are further discussed under articles 23 and 24.

Article 4 - States of emergency

110. Unlike many countries, the United States does not have a constitutional or legal regime either for declaring "states of emergency" or otherwise for imposing emergency rule by the executive branch. The U.S. military does not exercise criminal jurisdiction over civilian persons within the United States.

111. **Federal level**. The U.S. Constitution and implementing federal statutes do authorize the President in limited and clearly defined circumstances to use federal troops to control domestic violence, suppress insurrections and enforce federal law. These laws do not, however, authorize the executive branch to suspend or interfere with the normal operations of the other branches of the national government (the Congress and the judiciary) or to permit derogations from fundamental rights. Indeed, with only one limited exception (the right of habeas corpus, which Congress may temporarily suspend when public safety so requires), constitutional rights remain in effect at all times.

112. Article IV, section 4 of the Constitution imposes on the federal government the obligation to protect a state "on Application of the [State] Legislature, or of the [State] Executive (when the Legislature cannot be convened) against domestic Violence". Article I, section 8 authorizes the Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasion". This is the basis for intervention by federal troops or marshals in civil disorders occurring within the states.

113. The Constitution also provides, in article II, section 3, that the President "shall take Care that the Laws be faithfully executed". This provision has been interpreted to grant the President authority to enforce federal laws through extraordinary means if the President determines that unlawful obstructions or rebellion make it impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings.

114. Chapter 15 of Title 10, U.S. Code, defines the scope of the constitutional grants of emergency powers. Pursuant to the President's authority under article IV, section 4 of the Constitution, section 331 of Title 10 provides authority to the President to dispatch troops on request of the state's governor or legislature. The sending of troops is not, however, automatically triggered by the request of a state pursuant to this section. The President must use his own judgement as to whether the situation warrants the use of armed forces. Traditionally, three conditions have existed before troops have been sent: (i) the actual existence of domestic violence, (ii) a statement that the violence is beyond the control of the state authorities, and (iii) a proper request from the state governor or legislature.

115. Sections 332 and 333 of Title 10 provide authority for the President to dispatch troops without state request in order to enforce federal law, prevent obstruction of the execution of federal law, carry out federal court orders or

protect civil rights. These provisions overlap to some extent, but both are aimed at violence or insurrection obstructing or interfering with the enforcement of federal laws within a state. Section 332 is aimed generally at resistance to the carrying out of federal laws; section 333 is concerned with the forcible interference with the civil rights of individuals and with violence aimed at preventing the enforcement of court orders. These provisions were invoked by the President to enforce racial desegregation orders in certain states during the 1950s and 1960s.

116. Section 334 of Title 10 requires that, in all cases in which the President deems it necessary to use armed forces pursuant to his authority under Title 10, the President must issue a proclamation ordering the insurgents to disperse. Such proclamations are followed by an executive order directing the appropriate use of the armed forces to suppress the violence. They are also subject to Congressional oversight.

117. In addition to the President's Title 10 authority, there are further statutory grants of emergency powers to the President. The National Emergencies Act, 50 U.S.C. sections 1601 et seq., confers upon the President the authority to declare national emergencies and establishes procedures to be followed by the President in exercising emergency power. 50 U.S.C. sections 1601 et seq. Most importantly, the Act requires the President to report to Congress on actions taken and funds expended pursuant to a declaration of national emergency. The Act further allows Congress to terminate such states of emergency by enacting into law a joint resolution. This Act has typically been used in conjunction with the International Emergency Economic Powers Act (IEEPA, described in the next paragraph) to impose economic sanctions against other nations, rather than to deal with domestic or national security emergencies.

118. IEEPA, 50 U.S.C. sections 1701 et seq., allows the President, upon determination that an unusual and extraordinary threat exists, to issue executive orders investigating, regulating or prohibiting certain international transactions. In addition, the President may issue executive orders investigating, regulating, and otherwise affecting a wide variety of transactions in which foreign interests are implicated. In practice, the use of IEEPA has been primarily limited to the implementation of economic sanctions (often mandated by the United Nations) on the territory of the United States. IEEPA also imposes congressional reporting requirements upon the President. The Congress may terminate an IEEPA emergency power granted to the President by passing a joint resolution pursuant to certain provisions of the National Emergencies Act.

119. Most of the President's other congressionally mandated emergency powers, particularly in the case of natural disasters, are delegated to the Federal Emergency Management Agency (FEMA). These powers include, among others, his authority under the Disaster Relief and Emergency Assistance Act, 42 U.S.C. sections 5121 et seq.; the Fire Prevention and Control Act, 15 U.S.C. sections 2201 et seq.; the Flood Disaster Protection Act, 50 U.S.C. sections 4001 et seq.; the Federal Civil Defense Act, 50 U.S.C. sections 2251 et seq.; and the Earthquake Hazards Reduction Act, 42 U.S.C. sections 7701 et seq. FEMA acts as the focal point for all planning, preparedness, mitigation, response and recovery actions for such catastrophic domestic

emergencies. FEMA has no authority to suspend or infringe constitutional rights in the exercise of its duties. The Agency's purpose is to coordinate emergency activities at the national, state, and local levels, fund emergency programmes and provide technical guidance and training.

120. The Posse Comitatus Act, 18 U.S.C. section 1385, forbids the President to use the armed forces to "execute" the laws except where authorized by the Constitution or by another act of Congress. 18 U.S.C. section 1385. Under the Act, prohibited actions include interdiction of vehicles, vessels, and aircraft; searches and seizures; arrests and "stop and frisk" actions; surveillance or pursuit of individuals; investigation; and interrogation. Thus, in a disaster relief situation, absent any other legislation, federal troops must avoid a direct law enforcement role. They may, however, render humanitarian assistance, including the provision of emergency medical care to civilians and the destruction of explosives found in civilian communities.

121. **State and local levels**. At the state and local levels, a wide variety of emergency authorities permit the state executive branches (state governors, city mayors, county executives) to take emergency actions. These authorities are based on the general police power that is reserved to the states under the U.S. Constitution. In an emergency situation, a state may take reasonable actions necessary to preserve public health, safety and welfare, even if those actions incidentally infringe on otherwise protected rights. For example, states may impose curfews in situations of civil unrest or to prevent sabotage and espionage in times of war, establish quarantines during an epidemic, restrict water usage during a severe drought, and even regulate interest rates during times of economic emergency. These various state-imposed regimes may not, however, limit constitutional rights or infringe on the non-derogable rights specified in article 4 of the Covenant.

122. **Judicial review**. The federal courts have the power to review the exercise of emergency powers by the federal or state authorities, and have exercised considerable judicial scrutiny in this area. Judicial review has included examination of both substantive authority and procedural issues. As a general rule, cases in which the exercise of emergency power has resulted in the restriction of individual rights have been subjected to careful judicial review. See, e.g. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1886) (voiding a presidential order suspending habeas corpus); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (invalidating the seizure of steel mills pursuant to Presidential order during the Korean War); Dames & Moore v. Regan, 453 U.S. 654 (1981) (judicial review of constitutionality of President's orders regarding disposition of blocked Iranian assets under IEEPA).

123. **Emergency powers in practice**. Two recent examples of the use of federal emergency powers include the 1992 Los Angeles riots and the aftermath of Hurricane Andrew in 1992. In response to the riots and after receiving a request from the Governor of California, the President, pursuant to the authority vested in him by the Constitution and laws of the United States, including 10 U.S.C., chapter 15, issued a proclamation ordering all persons engaged in acts of violence to cease and desist. Immediately following the proclamation, the President issued an executive order directing federal law enforcement officers and the armed forces, including elements of the National Guard, to suppress the violence.

124. Throughout the emergency, the Department of Justice remained the lead federal agency, coordinating the response of all other federal agencies involved, including the Department of Defense (DOD). Although military forces had the authority to engage in direct law enforcement activities, for the most part they did not do so. Because the worst rioting had ended prior to the arrival of federal troops and because military commanders preferred not to involve soldiers in searches, arrests, pursuits, and other direct law enforcement activities, the military's principal role was to increase the security of the area, thereby deterring further rioting. Civilian agencies continued to perform the majority of law enforcement activities.

125. In response to the devastation of Hurricane Andrew in August 1992, the President declared a major disaster under the Stafford Disaster Relief Act (42 U.S.C. sections 5121-5203) for certain counties in southern Florida. When it became apparent that significant federal assistance would be needed in the disaster area and following a request from the Governor of Florida, the President authorized DOD to deploy a significant force to the disaster area to provide humanitarian relief.

126. Pursuant to the Stafford Act and the Federal Response Plan, the Federal Emergency Management Agency (FEMA) was the lead federal agency and had the authority to coordinate the activities of all federal agencies, including DOD. FEMA tasked DOD to provide assistance requested by state officials, and the joint task force had no authority to engage in relief activities other than as directed by FEMA. Unlike the Los Angeles deployment, the federal troops in Florida were not authorized to engage in law enforcement activities.

127. U.S. understanding. In keeping with its general understanding of the requirements of equal protection, as discussed in connection with article 2, the United States submitted the following understanding with respect to paragraph 1 of article 4 of the Covenant:

> "The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status."

In other words, distinctions having a "disproportionate effect" upon persons of a particular status, but not in fact based on that status at all, are not necessarily prohibited. Thus, for example, a curfew could be imposed as appropriate in view of safety requirements even if, due to patterns of residence, this affected certain groups more than others.

Article 5 - Non-derogable nature of fundamental rights

128. The United States was founded on basic principles of human rights from which it cannot deviate. In particular, the rights guaranteed in the U.S. Constitution, which substantially reflect the principles embodied in the Covenant, are the supreme law of the land. These guarantees represent a foundation that can never be broken. Congress and the states may protect rights to a greater extent, but never to a lesser extent than the Constitution

provides. In some instances, that foundation already provides greater protection than the Covenant. Therefore, the United States could never restrict fundamental human rights on the pretext that the Covenant does not recognize such rights or recognizes them to a lesser extent.

129. Furthermore, as the Covenant has been declared non-self-executing for purposes of U.S. laws, it could never be invoked in any judicial context to limit existing rights. More specifically, with respect to actions taken by the executive branch and the Congress, the United States declared in ratifying the Covenant:

> "It is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations."

130. The United States conditioned its ratification on this declaration to emphasize that it will continue to adhere to the constraints of its Constitution in respect to all restrictions and limitations of civil and political rights. Furthermore, the United States also made this declaration to indicate as clearly as possible its belief that as a general rule States Party should resort to such restrictions only under the most unusual and compelling circumstances.

Article 6 - Right to life

131. **Right to life, freedom from arbitrary deprivation**. This right is protected by the federal and state constitutions and law. The Fifth Amendment to the U.S. Constitution provides that "no person shall ... be deprived of life, liberty, or property, without due process of law". The Fourteenth Amendment provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law". These provisions incorporate the constitutional recognition of every human's inherent right to life and the doctrine that this right shall be protected by law. The Fifth and Fourteenth Amendments also make unconstitutional the state-engineered disappearance of individuals.

132. The value of human life is further protected by the criminal codes of the U.S. Government, the 50 states, the several U.S. territories, and other constituent jurisdictions which all criminalize the arbitrary and unjustified deprivation of life. Each jurisdiction has statutes that penalize murder and impose the most severe criminal penalties for homicide that is accompanied by specific aggravating factors.

133. The federal statutes protecting life and penalizing the deprivation of life with sentences of either capital punishment or life imprisonment include the following:

First degree murder (18 U.S.C. section 1111);

Killing a witness (18 U.S.C. section 1512(a));

Assassination of the President, President-elect, Vice-President, or one of a limited group of other persons under the statute (18 U.S.C. section 1751);

Murder by any person engaged in a continuing criminal drug enterprise or the murder of a law enforcement official during the commission of a drug felony (21 U.S.C. section 848(e));

Wilful destruction of an aircraft or motor vehicle with the intent to endanger the safety of any person on board, which has resulted in the death of any person (18 U.S.C. section 34);

Wilfully derailing, disabling, exploding, or causing a train wreck, that results in death (18 U.S.C. section 1992);

Offences involving the transportation of explosive material with the knowledge that it will be used to kill, injure or intimidate (18 U.S.C. section 844(d));

Destruction of U.S. Government property by fire or through the use of explosives that results in death (18 U.S.C. section 844(f));

The mailing of injurious articles with intent to kill or injure and that results in death (18 U.S.C. section 1716);

Genocide (18 U.S.C. section 1091(b)), which includes killing, seriously wounding, or inflicting other specified types of destruction upon members of a national, ethnic, racial, or religious group with the specific intent to destroy that group completely or in substantial part;

Terrorism (18 U.S.C. section 2331), which consists of killing a U.S. national outside the United States, or while outside the United States, attempting to kill or engaging in a conspiracy to kill a U.S. national; the statute requires a written certification by a high-ranking official of the Department of Justice "that, in the judgment of the certifying official, such offence was intended to coerce, intimidate, or retaliate against a government or a civilian population" (18 U.S.C. section 2332(d));

Conspiracy to cause the death of another (18 U.S.C. section 1117);

Killing or attempting to kill an "internationally protected person" (18 U.S.C. section 1116), including but not limited to heads of state and foreign ministers and accompanying members of their families if in a country other than their own; and representatives, officers, agents, and

employees of the United States or a foreign government, or international organization, entitled under international law to protection. The alleged offender must be present within the United States. His or her nationality is irrelevant;

Treason, under a statute that provides that "[w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere" (18 U.S.C. section 2381);

Espionage (18 U.S.C. section 794); and

Air piracy where death results (49 U.S.C. section 1472(i), (n)).

The Uniform Code of Military Justice also proscribes capital punishment for certain offences. 10 U.S.C. sections 801 et seq.

134. The U.S. Code also proscribes attempted murder, which is punishable by a term of 20 years' imprisonment (18 U.S.C. section 1113), and manslaughter, defined as the unlawful killing of a human being without malice (18 U.S.C. section 1112). Voluntary manslaughter is a killing that occurs during a sudden quarrel or in the heat of passion; involuntary manslaughter occurs during the commission of an unlawful act not amounting to a felony, a lawful act in an unlawful manner, or a lawful act that, without due caution and circumspection, might produce death.

135. Other crimes, such as arson and kidnapping, carry severe penalties that are augmented when they jeopardize human life and even more severe penalties when a death results. For example, arson carries a federal penalty of five years' imprisonment, but an arson that places a life in jeopardy is punishable by 20 years' imprisonment. See 18 U.S.C. section 81. Similarly, the penalties for assaults are increased from 3 years' to 10 years' imprisonment when the assault is committed by the use of a deadly or dangerous weapon. The punishment for certain serious drug offences also is enhanced when the offender uses a firearm. 18 U.S.C. section 924(c)(1).

136. Every state also criminalizes deliberate acts that result in death or serious threat to life. However, offences may vary in detail from state to state. State criminal laws concerning murder, manslaughter, and conspiracy are essentially similar to the federal law; the most severe punishments are allocated to the acts committed with the most particular intent to cause death. At present, the statutes of 37 states provide the death penalty for murder and, in a few of these states, for other offences, almost all for offences resulting in death.

137. The issue of race and the death penalty is discussed under article 2; death-row conditions are discussed under article 7.

138. **Official use of force**. The protection of the right to life is also implicated in statutes regulating the official use of force. Prison guards, sheriffs, police, and other state officials who abuse their power through excessive use of force may be punished under 18 U.S.C. sections 241 and 242, discussed under article 2. Where law enforcement officials are involved in

using excessive force, individually or in a conspiracy, victims are protected with respect to the rights secured by the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. Which amendment is involved depends upon the status of the victim as an arrestee (Fourth Amendment), a pretrial detainee (Fourteenth Amendment), or a convicted prisoner (Eighth Amendment). Graham v. Connor, 490 U.S. 386 (1989).

139. Death penalty. The sanction of capital punishment continues to be the subject of strongly held and publicly debated views in the United States. The majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country. In addition, federal law provides for capital punishment for certain very serious federal crimes. Capital punishment is only carried out under laws in effect at the time of the offence and after exhaustive appeals. The U.S. Supreme Court has held that the Eighth Amendment to the U.S. Constitution (which proscribes cruel and unusual punishment) does not prohibit capital punishment. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). However, the death penalty is available for only the most egregious crimes and, because of its severity, warrants unique treatment that other criminal sentences do not require.

140. First, it cannot be imposed even for serious crimes - such as rape, kidnapping, or robbery - unless they result in the death of the victim. Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782, 797 (1982); Eberheart v. Georgia, 433 U.S. 917 (1977); Hooks v. Georgia, 433 U.S. 917 (1977). Moreover, it is not enough for imposition of capital punishment that the crime resulted in death; the crime must also have attendant aggravating circumstances. In other words, restrictions on imposition of the death penalty are tied to a constitutional requirement that the punishment not be disproportionate to the personal culpability of the wrongdoer, Tison v. Arizona, 481 U.S. 137, 149 (1987), and the severity of the offence, Coker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty is disproportionate punishment for crime of rape).

141. Thus, offences set forth in several federal statutes (e.g., first degree murder) that were enacted before 1968, the date of the decision in United States v. Jackson, 390 U.S. 570, in theory carry a death penalty, but because the crimes are not narrowed sufficiently by statutorily required aggravating circumstances, the death penalty in fact may not be imposed for those crimes.

142. As noted elsewhere, the ex post facto clause of the Constitution bars the retroactive increase in penalties available in criminal cases. In operation, it thus forbids the Government from imposing a death penalty on an offender for a crime that, at the time of its commission, was not subject to capital punishment.

143. The death penalty cannot be carried out unless imposed in a judgement issued by a competent court and subject to appellate review. Of the 36 states with capital punishment statutes at the end of 1991, 34 provided for an automatic review of each death sentence and 31 provided also for automatic review of the conviction. Those that do not mandate automatic review authorize review when the defendant wishes to appeal. The fact that a state

appellate court reviews each death sentence to determine whether it is proportionate to other sentences imposed for similar crimes reduces the likelihood that the death penalty will be inflicted arbitrarily and capriciously so as to constitute cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153 (1976). Typically the review is undertaken regardless of the defendant's wishes and is conducted by the state's highest appellate court. In the states not providing automatic review, the defendant can appeal the sentence, the conviction, or both. If an appellate court vacates either the sentence or the conviction, it may remand the case to the trial court for additional proceedings or for retrial. As a result of resentencing or retrial, it is possible for the death sentence to be reimposed.

144. Finally, the U.S. Supreme Court has found that where a sentencing jury may impose capital punishment, the jury must be informed if the defendant is parole ineligible, in other words where a life prison sentence could not result in parole. Simmons v. South Carolina, 114 S.Ct. 2187 (1994) (plurality).

145. **Right to seek pardon or commutation**. Under the U.S. system, no state may prohibit acts of executive clemency, including amnesty, pardon, and commutation of sentence. Gregg v. Georgia, 428 U.S. 153, 199 (1976). Indeed, in a recent Supreme Court decision, Herrera v. Collins, 113 S.Ct. 853 (1993), the Court recognized the availability of executive clemency for persons facing the death penalty whose convictions have been affirmed, whose collateral appeal rights have been exercised and exhausted, and who thereafter present a newly articulated claim of factual innocence.

146. **Genocide**. The United States is a party to the Convention on the Prevention and Punishment of the Crime of Genocide, and has fully implemented its obligations under that Convention. The United States Code makes genocide a federal criminal offence punishable by life imprisonment. The implementing statute, 18 U.S.C. section 1091(b), defines genocide to include killing, seriously wounding, or inflicting other specified types of destruction upon members of a national, ethnic, racial, or religious group with the specific intent to destroy that group completely or in substantial part.

147. **U.S. reservation**. The application of the death penalty to those who commit capital offences at ages 16 and 17 continues to be subject to an open debate in the United States. In the United States the death penalty may be imposed on wrongdoers who were 16 or 17 years of age at the time of the offence. The Supreme Court ruled that it is unconstitutional to impose a death penalty upon a person who was 15 years of age when he committed the offence (Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion)), but it has approved under the Eighth Amendment the imposition of a death penalty on a wrongdoer who was 16 years of age at the time of the murder (Stanford v. Kentucky, 492 U.S. 361 (1989)). Four of the nine Justices dissented in the latter case, contending that execution of an offender under 18 years of age is disproportionate and unconstitutional. Id. at 403. A more recent Supreme Court decision addressing the issue noted that of 36 states whose laws permitted capital punishment at the time of the decision, 12 declined to impose it on persons 17 years of age or younger, and 15 declined to impose it on 16-year-olds. Stanford v. Kentucky, 492 U.S. 361 (1989).

148. Because approximately half the states have adopted legislation permitting juveniles aged 16 and older to be prosecuted as adults when they commit the most egregious offences, and because the Supreme Court has upheld the constitutionality of such laws, the United States took the following reservation to the Covenant:

> "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

Article 7 - Freedom from torture, or cruel, inhuman or degrading treatment or punishment

149. **Torture**. U.S. law prohibits torture at both the federal and state levels. As this report is being prepared, the U.S. is completing the process of ratifying the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Torture has always been prohibited by the Eighth Amendment to the U.S. Constitution. As a consequence, torture is unlawful in every jurisdiction of the United States, and "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". U.S. Constitution, Amendment VIII.

150. **Cruel, inhuman or degrading treatment or punishment**. The Eighth Amendment to the U.S. Constitution (applicable to actions of the federal government) and the Fourteenth Amendment (making the Eighth Amendment applicable to the states) prohibit cruel and unusual punishment. Cruel and unusual punishments include uncivilized and inhuman punishments, punishments that fail to comport with human dignity, and punishments that include physical suffering. Furman v. Georgia, 408 U.S. 238 (1972). Since the prohibition of cruel, inhuman or degrading treatment or punishment and the promotion of humane treatment consistent with human dignity are intertwined, the discussion in this section relates also to paragraph 1 of article 10. Because the scope of the constitutional protections differs from the provisions of article 7, the U.S. conditioned its ratification upon a reservation discussed below.

151. **Basic rights of prisoners**. The U.S. Supreme Court has applied the constitutional prohibition against cruel and unusual punishment not only to the punishments provided for by statute or imposed by a court after a criminal conviction, but also to prison conditions and treatment to which a prisoner is subjected during the prisoner's period of incarceration. See Estelle v. Gamble, 429 U.S. 97 (1976). Prisoners may not be denied an "identifiable human need such as food, warmth, or exercise". Rhodes v. Chapman, 452 U.S. 337 (1981). Accordingly, prisoners must be provided "nutritionally adequate food, prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it". Ramos v. Lane, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Prisoners must also be provided medical care, although an inadvertent failure to provide medical care does not rise to the level of a constitutional violation. Rather, it is prison officials' "deliberate indifference to a prisoner's serious illness or injury" that constitutes cruel and unusual

punishment. Estelle v. Gamble, 429 U.S. 97 (1976). Prison officials have a duty to protect prisoners from violence inflicted by fellow prisoners. Hudson v. Palmer, 468 U.S. 517 (1984). Because prisons are by definition dangerous places, prison administrators are responsible to victims only if they had prior knowledge of imminent harm. Finally, prisoners must not be subject to excessive use of force. Force may be applied "in a good faith effort to maintain or restore discipline", but may not be used "maliciously and sadistically to cause harm". Whitley v. Abers, 475 U.S. 312, 320-21 (1986). It does not matter whether the force results in serious injury. Hudson v. McMillan, 112 S.Ct. 995 (1992).

152. The Department of Justice can criminally prosecute any prison official who wilfully causes a convicted prisoner to be subjected to cruel and unusual punishment under 18 U.S.C. section 241 and/or section 242. In addition, certain federal and state statutes call for affirmative protection of the interests of prisoners. For example, 18 U.S.C. section 4042 imposes a duty upon the Attorney General to provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offences against the United States, and to provide for the protection, instruction, and discipline of such persons.

153. The Attorney General may also initiate civil actions under the Civil Rights of Institutionalized Persons Act when there is reason to believe that a person, acting on behalf of a state or locality, has subjected institutionalized persons (including persons in facilities for nursing or custodial care, for juvenile and pretrial detainees, and for the mentally or physically ill, disabled, or handicapped, as well as correctional facilities) to "egregious or flagrant conditions which deprive such persons of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm". 42 U.S.C. section 1997a.

154. Prisoners who have been subjected to cruel and unusual punishment may file a civil suit to recover damages from the individuals who inflicted such punishment. Where the perpetrators are agents of the federal government, these suits are based on the legal precedent established by the case of Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971), in which the Supreme Court held that officials of the federal government may be held personally liable for actions undertaken in their official capacity. Prisoners also may sue the federal government under the Federal Tort Claims Act, 28 U.S.C. sections 2671, et seq. Where the perpetrators are agents of state or local governments, the victim may sue under 42 U.S.C. section 1983.

155. **Solitary confinement and special security measures**. Convicted prisoners may be subjected to special security measures and segregation (i.e., physical separation from the general prison population) only in unusual circumstances. Such measures may be employed for punitive reasons or as a means of maintaining the safety and security of inmates and staff in the institution. No conditions of confinement, including segregation, may violate the proscription of the Eighth Amendment, nor may they violate the prisoners' rights to due process and access to the courts under the Fifth and Fourteenth Amendments.

156. All correctional systems in the U.S. have codes of conduct that govern inmate behaviour, and all have systems for imposing sanctions when inmates violate this code. These disciplinary systems are essential to ensuring the security and good order of correctional institutions. Inmates are provided a copy of the code of conduct immediately upon their arrival at a correctional institution, and additional copies are maintained in the inmate law libraries. The prison disciplinary process is administered internally, but there are important constitutional requirements that provide guidance.

157. Segregation is one of the sanctions that may be imposed upon an inmate who, it has been determined, has violated the code of conduct. Before this sanction may be imposed, the inmate is entitled to due process protection emanating from the Fifth and Fourteenth Amendments of the Constitution and recognized by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Specifically, an inmate must be provided written notice of the claimed violation and a written statement of the evidence relied upon in the disciplinary action taken; inmates must be permitted at least 24 hours to prepare for his or her appearance before the disciplinary officer or committee; inmates must be permitted to call witnesses at the hearing or at the least introduce written statements from witnesses; and must be permitted to seek assistance from a fellow inmate or from staff if he or she is illiterate or does not understand the proceedings. In addition, an impartial decision maker must preside over the hearing. If, after the preceding procedures have been followed, the disciplinary officer concludes that the inmate is deserving of punishment, segregation is one of many possible sanctions. The prisoner is given a specific term to remain in segregation (generally no more than 60 days), and this sentence may be appealed to higher level officials within the department of corrections. As with every other aspect of his or her imprisonment, the inmate has the opportunity to file suit in court.

158. Inmates may also be separated from the general prisoner population as the result of a classification decision. Prison administrators may determine that, based on a host of factors, an inmate's presence in general population would pose a substantial threat of harm to him/herself or others and the inmate therefore must be removed. This decision must be documented. Because this removal is an administrative rather than a punitive measure, it is usually not necessary to comply with the requirements of Wolff v. McDonnell delineated above. As a general matter, prison administrators may transfer prisoners to any correctional institution at any time for any reason. See Olim v. Wakinekona, 461 U.S. 238 (1983). But, if the prisoner's conditions of confinement are dramatically altered as a result of the classification decision, he or she may be entitled to some due process protection. See Vitek v. Jones, 445 U.S. 480 (1980) (requiring due process procedures for prisoners being transferred from a prison to a mental hospital).

159. Prisoners may also be segregated for medical reasons. This frequently occurs when inmates have communicable diseases. In such cases, the fact and duration of the segregation is determined by medical staff.

160. Segregation is not solitary confinement. The segregation unit in a prison separates, or segregates, certain prisoners from those who are in

general population. Inmates in segregation are not permitted to eat in the dining hall; rather, they are served in their cells. They are not permitted to report to their work assignments, nor are they permitted to attend school. They are permitted to exercise (though they may not be permitted to do so out of doors) and they are permitted to read and to correspond. Depending upon the reason for their segregation, they may be permitted to listen to the radio and watch television if available. Some rights and privileges may not be abridged by virtue of an inmate's placement in segregation, whatever the reason for such placement. First, they must be permitted to correspond with persons outside the prison in the same fashion as prisoners in general population. Second, they must be allowed visits with friends or relatives, and to make telephone calls. Inmates must also be permitted access to the law library, their legal papers, and their attorney. Finally, they must be given appropriate medical care, food, clothing, and other basic necessities.

161. Inmates held in segregation have limited contact with other inmates and with staff, but under no circumstances will they be denied all human contact. For the duration of their stay in segregation, inmates are carefully monitored by medical and mental health personnel to ensure they do not suffer detrimental effects.

162. **Visitation**. Prison administrators are afforded great deference in assessing what type of restrictions are necessary to maintain order and control in a correctional institution. Prison administrators could, within the strictures of the Constitution, prohibit prisoners from visiting with friends or family members. See Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989); Meachum v. Fano, 427 U.S. 215 (1976). As the Supreme Court observed in Price v. Johnson, 334 U.S. 266 (1948), "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our prison system". Neither the prisoners nor the members of the public have a constitutional right to visit persons in prison. Nevertheless, prison administrators everywhere in the United States permit visitation, and most even encourage family members and friends to visit. The Federal Bureau of Prisons encourages visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community. 28 C.F.R. section 540.40. The number of visits prisoners are allowed each month, the duration of each visit, and the number of visitors allowed at any given time are all established by department of corrections' regulations which are made available to the inmates. In addition to visits with friends and family members, prisoners are permitted to meet with their attorneys, members of the clergy, and sometimes members of the media.

163. Prisoners may be restricted from visiting for a limited period of time as a sanction for violating prison rules of conduct. In many prison systems, however, including the Federal Bureau of Prisons, visits will be suspended only for violation of regulations specifically concerned with visitation guidelines or orderliness and security in the visiting room. See 28 C.F.R. section 540.50(c).

164. Restrictions are imposed on the visitors as well as on the prisoners; such restrictions vary depending upon the security level of the correctional

institution and the classification status of the inmate. For example, inmates in maximum security prisons may be permitted only non-contact visits where the visitor and the prisoner are separated by a pane of glass and must speak to one another using a telephone. Prisoners in medium or minimum security institutions can often sit side-by-side in the visiting room and the prisoners can hold their children. In some prisons visits are held outside, weather permitting. Inmates in segregation may be required to wear restraints, such as handcuffs, during the visits. All prisoners are required to submit to a strip search prior to and immediately after a visit. This procedure prevents the admission of contraband into the prison. Visitors are generally required to pass through a metal detector; sometimes they are required to submit to a pat search of their person and their belongings. In rare circumstances visitors may be subjected to a strip search. Of course, visitors may opt not to visit rather than undergo these procedures.

165. In most correctional systems in the country, visitors are prohibited from bringing items to prisoners, such as food, papers, clothes, etc. Procedures exist for processing incoming items, but in order to maintain security the items may not be passed directly to the prisoner. There are other restrictions on what may transpire during visits. For example, sexual contact is usually not permitted, though in some prisons the inmates are permitted to kiss the visitor once upon first seeing them and once more prior to the end of the visit. On the other hand, many systems allow conjugal visits.

166. Death row. As discussed under article 6, the U.S. Supreme Court has ruled that the death penalty is not in and of itself cruel and unusual punishment. For many years, the Court set aside sentences of death that were imposed under a procedure that allowed prejudice and discrimination to be factors in determining the sentence. Furman v. Georgia, 408 U.S. 238 (1972). Since that decision, many states and the federal government have created new death penalty laws that have withstood Supreme Court scrutiny. As of 20 April 1994, there were approximately 2,848 prisoners on death row, all of whom had been convicted of murder. In 1993, 38 prisoners were executed, bringing to 240 the total of all prisoners executed since 1976, the year the Supreme Court reinstated the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976).

167. In the states that have prisoners under sentence of death, various protection are afforded to ensure that their treatment is neither cruel, unusual, or inhumane. The living conditions and treatment of such prisoners are guided by department of corrections' regulations unique to each state, but there are some general principles that apply universally. Most departments of corrections house death penalty prisoners in a separate wing of a maximum security prison to ensure that these prisoners do not mingle with prisoners in the general population. Death row inmates spend a great majority of time in their cells. In some states they are permitted to work and to attend programmes and activities, and in all states they are given time for recreation. Most death row inmates have access to educational programmes though in many cases they are self-study programmes. All death row inmates are given access to library books, legal resources and other resources. They are also permitted to make purchases from the commissary. Inmates under sentence of death spend a great deal of time pursuing hobbies such as arts and crafts, drawing, and bible study. They are permitted to visit with family

members and friends as well as attorneys. In some states the visits are non-contact, and in many states the visits take place in an area removed from the general population visits. Finally, death row inmates are permitted to correspond with persons outside the institution and to make telephone calls.

168. Currently, in nearly every state death row inmates live in single-person cells, though population pressures may cause this to change. There is always concern regarding the mental health and psychological state of death row inmates. Accordingly, in many states these inmates are reviewed by a psychologist or psychiatrist on a regular basis, and in all states inmates have access to such professionals upon request. Death row inmates have access to religious services and activities, though generally such activities take place in the individual's cell or in an area separated from the general population. Staff selected to work with death row inmates are generally very experienced; a 1991 study by the American Corrections Association and the National Institute of Justice revealed that staff working these positions had, on average, seven years' experience. Only a few states provide specialized training for staff who work with death-sentenced inmates, though most correctional administrators specially select staff who are particularly professional and mature.

169. Death row inmates have access to the same types of recourse available to other inmates to redress grievances. They can file a formal grievance through the internal administrative remedy process, they can file suit in court, and they can write to the news media and legislators.

170. Pretrial detention. Persons detained pretrial or otherwise have not been convicted of a crime and therefore, under the Fifth and Fourteenth Amendments, they have a right to remain free from "punishment" of any type. Id. The mere fact of detention, however, does not in and of itself constitute "punishment", nor do the "[l]oss of freedom of choice and privacy [that] are inherent incidents of confinement". Bell v. Wolfish, 441 U.S. 520 (1979). Pretrial detainees may be subject to restrictions and conditions accompanying such confinement that are necessary to maintain order and security at the institution, but they may not be subjected to any restrictions that are imposed for the purpose of punishment. Pretrial and other detainees are thus treated differently than convicted inmates, and correctional workers are informed of these differences through training and institution policies. In addition, although the Eighth Amendment does not apply directly to detainees, courts have determined that detainees enjoy equivalent protection with regard to conditions of detention.

171. Persons detained by the federal government may be housed in local jails, federal detention centres, or special units within federal correctional institutions. The staff at a local jail may be state or local police officers, or they may be correctional officers. At federal facilities the staff are always federal correctional officers. The latter group are trained correctional officers who are instructed regarding appropriate treatment. Federal pretrial detainees are, to the extent practicable, housed separately from convicted persons. 18 U.S.C. section 3142 (i). Standards promulgated by the American Correctional Association require that facilities provide for "the separate management" of detainees (witnesses, civil inmates, etc.) from the general offender population.

172. **Psychiatric hospitals**. As discussed under article 9, individuals with mental illness may be committed to psychiatric hospitals through either involuntary or voluntary commitment procedures for the purpose of receiving mental health services. Patients are afforded Fourteenth Amendment substantive due process protection designed to ensure that conditions of confinement do not violate their constitutional rights. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court held that all institutionalized persons, including mental patients, are entitled to adequate food, clothing, shelter, medical care, reasonable safety, and freedom from undue bodily restraint.

173. Complaints tend to focus on inadequate conditions of confinement, i.e. lack of adequate staff and staff supervision of patients, inadequate medical and psychiatric care, overuse and misuse of medication, lack of adequate services for geriatric patients, and unsanitary conditions. In addition to private remedies which are available to mental patients, federal statutes require each state to establish a "protection and advocacy" system to monitor state psychiatric hospitals and to make appropriate arrangements for individual patients with various problems and difficulties. See 42 U.S.C. sections 10801 et seq. (Protection and Advocacy Systems for individuals with Mental Illness). Moreover, pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. sections 1997, et seq., the Attorney General has authority to investigate, and file civil lawsuits as necessary, based on the belief that conditions in a state-operated psychiatric hospital are subjecting patients to a pattern or practice of deprivations of their constitutional rights. Since the enactment of the statute in 1980, some 62 facilities holding mentally disabled persons have been investigated and relief sought, as appropriate.

174. **Corporal punishment in public schools**. While corporal punishment is rare in the U.S. educational system, the U.S. Supreme Court decided, in Ingraham v. Wright, 430 U.S. 651 (1977), that teachers may impose reasonable but not excessive force to discipline a child. Therefore, it is not cruel and unusual punishment for schools to use corporal punishment. However, students may sue for assault and battery if the punishment is excessive. By 1993, 25 states in the United States had banned corporal punishment. Additionally, hundreds of cities and school boards in those states that do allow corporal punishment have banned it. The federal government's role in this area is limited to protection from discrimination on the basis of race, sex, national origin, disability, or age in the imposition of corporal punishment.

175. **Military justice system**. Article 55 of the Uniform Code of Military Justice specifically prohibits punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment. The article also prohibits the use of irons, single or double, except for the purpose of safe custody. If a commanding officer were to subject a service member to such punishment, the commanding officer (as well as the individuals who actually carried out the punishment) would be subject to court-martial for maltreatment (art. 92) and assault (art. 128), at the very least. A service member might also pursue a civil tort action, for money damages, against the perpetrator. A commanding officer who orders the illegal punishment would be acting outside the scope of his position and would be individually liable for the intentional infliction of bodily and emotional harm.

176. **U.S. reservation**. The extent of the constitutional provisions discussed above is arguably narrower in some respects than the scope of article 7. For example, the Human Rights Committee adopted the view that prolonged judicial proceedings in cases involving capital punishment might constitute cruel, inhuman or degrading treatment or punishment in contravention of this standard. The Committee has also indicated that the prohibition may extend to such other practices as corporal punishment and solitary confinement.

177. As such proceedings and practices have repeatedly withstood judicial review of their constitutionality in the United States, it was determined to be appropriate for the United States to condition its acceptance of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on a formal reservation to the effect that the United States considers itself bound to the extent that "cruel, inhuman treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. For the same reasons, and to ensure uniformity of interpretation as to the obligations of the United States under the Covenant and the Torture Convention on this point, the United States took the following reservation to the Covenant:

> "The United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

178. **Medical or scientific experimentation**. Non-consensual experimentation is illegal in the U.S. Specifically, it would violate the Fourth Amendment's proscription against unreasonable searches and seizures (including seizing a person's body), the Fifth Amendment's proscription against depriving one of life, liberty or property without due process, and the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.

179. Comprehensive control of unapproved drugs is vested by statute in the federal Food and Drug Administration (FDA). The general use of such drugs is prohibited, see 21 U.S.C. section 355(a), but the FDA permits their use in experimental research under certain conditions. 21 U.S.C. sections 355(i), 357(d); 21 C.F.R. section Part 50. The involvement of human beings in such research is prohibited unless the subject or the subject's legally authorized representative has provided informed consent, with the limited exceptions described below. The FDA regulations state in detail the elements of informed consent. 21 C.F.R. sections 50.41-50.48.

180. An exception is made where the human subject is confronted by a life-threatening situation requiring use of the test article, legally effective consent cannot be obtained from the subject, time precludes consent from the subject's legal representative, and there is no comparable alternative therapy available. The Commissioner of the FDA may also determine that obtaining consent is not necessary if the appropriate Department of Defense official certifies that informed consent is not feasible in a specific military operation involving combat or the immediate threat of combat. This

regulatory exception has been challenged in litigation and upheld as consistent with the governing statutes and the U.S. Constitution. Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991).

181. The United States has also undertaken substantial efforts to diagnose and redress injuries that may have been caused by past exposure to potentially dangerous military agents. Thus, it continues to fund epidemiological studies in an attempt to resolve lingering scientific and medical uncertainty surrounding the long-term health effects of exposure to herbicides containing dioxin and to ionizing radiation. It has also provided military veterans with an expeditious means of obtaining compensation for claims based on exposure to such herbicides during service in the Republic of Viet Nam, or exposure to ionizing radiation during atmospheric nuclear tests or the American occupation of Hiroshima and Nagasaki, and has established guidelines for evaluating and applying the latest scientific evidence. The Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2727 (1984). Civilian residents of the relevant areas put at risk by nuclear testing or employed in uranium mining can also recover sizeable compensation if they have developed any of a number of specified diseases. Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990).

182. In December 1993, it became widely known that between 1944 and 1974 the United States Government conducted and sponsored a number of experiments involving exposure of humans to radiation. While certain experiments resulted in valuable medical advances including radiation treatment for cancer and the use of isotopes to diagnose illnesses, a number of the experiments may not have been conducted according to modern-day ethical guidelines. Moreover, the majority of the records of the experiments were kept secret for years. The United States Government has taken a number of steps to investigate the propriety of the experiments. For instance, the Department of Energy established a centralized information centre in Washington, D.C., that holds 270,000 records on nuclear testing and 7,000 records on all types of human experiments, and identified approximately 2,500 records of human radiation experiments and placed them in public reading rooms around the country. By executive order in January 1994, the President established the Advisory Committee on Human Radiation Experiments, which is charged with investigating the propriety and ethics of all human radiation experiments conducted by the Government, and determining whether researchers obtained informed consent from their subjects. Currently, the U.S. Congress and the Executive Branch are considering to what extent compensation may be appropriate in various cases.

183. Experimentation on prisoners is restricted by the Fourth, Fifth, and Eighth Amendments to the United States Constitution, by statutes, and by agency rules and regulations promulgated in response to such provisions. As a general matter, in the United States, "[e]very human being of adult years or sound mind has a right to determine what shall be done with his own body ...". Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 105 N.E. 92, 93 (1914). Accordingly, prisoners are almost always free to consent to any regular medical or surgical procedure for treatment of their medical conditions. Consent must be "informed": the inmate must be informed of the risks of the treatment; must be made aware of alternatives to the treatment; and must be mentally competent to make the decision. But due to possible "coercive factors, some blatant and some subtle, in the prison milieu",

(James J. Gobert and Neil P. Cohen, Rights of Prisoners, New York: McGraw Hill, Inc., 1981, pp. 350-51) prison regulations generally do not permit inmates to participate in medical and scientific research.

184. The Federal Bureau of Prisons prohibits medical experimentation or pharmaceutical testing of any type on all inmates in the custody of the Attorney General who are assigned to the Bureau of Prisons. 28 C.F.R. section 512.11(c).

185. Moreover, the federal government strictly regulates itself when conducting, funding, or regulating research in prison settings. An Institutional Review Board, which approves and oversees all research done in connection with the federal government, must have at least one prisoner or prisoner representative if prisoners are to be used as subjects in the study. Research involving prisoners must present no more than a minimal risk to the subject, and those risks must be similar to risks accepted by non-prisoner volunteers. See 28 C.F.R. Part 46. Furthermore, guidelines established by the Department of Health and Human Services provide that the research proposed must fall into one of four categories:

> "(1) Study of the possible causes, effects, and processes of incarceration, and of criminal behaviour, provided that the study presents no more than a minimal risk and no more than inconvenience to the subject;
>
> (2) Study of prisons as institutional structures or of prisoners as incarcerated persons, provided that the study presents no more than minimal risk and no more than inconvenience to the subject;
>
> (3) Research on conditions particularly affecting prisoners as a class;
>
> (4) Research on practices, both innovative and accepted, which have the intent and reasonable probability of improving the health and well-being of the subject."

45 C.F.R. section 46.306(a)(2).

186. Similar standards have been developed within the broader correctional community that strictly limit the types of research conducted in prisons, even with an inmate's consent. For example, in its mandatory requirements for institutional accreditation, the American Correctional Association (ACA) stipulates that:

> "Written policy and practice prohibit the use of inmates for medical, pharmaceutical, or cosmetic experiments. This policy does not preclude individual treatment of an inmate based on his or her need for a specific medical procedure that is not generally available (emphasis added)."

Mandatory Standard 3-4373, Section E, "Health Care", in Standards for Adult Correctional Institutions, 3rd ed., Laurel, Maryland: American Correctional Association, January 1990, p. 126.

The commentary accompanying this mandatory regulation reads:

> "Experimental programmes include aversive conditioning, psychosurgery, and the application of cosmetic substances being tested prior to sale to the general public. An individual's treatment with a new medical procedure by his or her physician should be undertaken only after the inmate has received full explanation of the positive and negative features of the treatment."

(Id.)

187. Non-medical, academic research on inmates is normally allowable in federal and state prisons with the inmate's express consent. This type of research normally consists of inmate interviews and surveys. Inmates are not required to participate in any research activities other than those conducted by correctional officials for purposes of inmate classification, designation, or ascertaining inmate programme needs (e.g., employment preparation, educational development, and substance abuse and family counselling).

Article 8 - Prohibition of slavery

188. Slavery and involuntary servitude. Abolition of the institution of slavery in the United States dates from President Lincoln's Emancipation Proclamation, effective in 1863, and the Thirteenth Amendment to the U.S. Constitution adopted in 1865. The Thirteenth Amendment also prohibits the holding of a person in involuntary servitude. The U.S. Department of Justice prosecutes involuntary servitude cases under three statutes designed to implement the Thirteenth Amendment, 18 U.S.C. sections 1581, 1583, and 1584, and under 18 U.S.C. section 241, which criminalizes conspiracies to interfere with the exercise of constitutional rights. In this context, 18 U.S.C. section 241 criminalizes conspiracies to interfere with a person's Thirteenth Amendment right to be free from involuntary servitude. The other involuntary servitude statutes make unlawful: (i) holding or returning a person to a condition of peonage (section 1581); (ii) carrying a person away to or enticing a person to involuntary servitude (section 1583); and (iii) holding a person to a condition of involuntary servitude (section 1584). Peonage is a form of involuntary servitude based on real or alleged indebtedness.

189. In 1988, the U.S. Supreme Court defined involuntary servitude to mean a condition of servitude in which the victim is forced to do labour for another individual through the use or threatened use of physical or legal coercion. United States v. Kozminski, 487 U.S. 931 (1988). Thus, Department of Justice prosecutions of involuntary servitude require evidence showing the use or threatened use of physical or legal coercion by the defendant as a sufficient means of holding the victim to a condition of forced labour. Psychological coercion alone used to hold a person to forced labour does not constitute involuntary servitude. Id. at 948-49. Evidence of coercive measures such as withholding a victim's mail or isolating the victim from members of his family in an effort to dissuade the victim from leaving his place of labour is not by itself sufficient for an involuntary servitude conviction. However, the age, mental competency, or other specific characteristics of a victim may be

relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that victim to involuntary servitude. Id. at 948. For example, a child who is told he can go home through a strange area at night may be subject to physical coercion where an adult would not be, and an illegal immigrant threatened with deportation may be subject to legal coercion where a citizen of the United States would not be.

190. Unfortunately, cases of involuntary servitude continue to arise under these statutes. The Department of Justice's enforcement efforts in recent years have principally involved two categories of prosecutions: (1) migrant worker cases; and (2) cases involving persons with particular vulnerabilities.

191. The migrant worker cases typically involve the recruitment of workers through deceit or force to perform agricultural work at a labour camp. The workers are generally informed after a few days that they are being charged for meals, shelter, and other necessities and that they may not leave until they have worked off their debts. The operators of the camp often employ threats and acts of violence to create a climate of fear and intimidation that prevents the workers from leaving the camp.

192. In United States v. Warren, a 1983 prosecution in the Middle District of Florida, four defendants were convicted of holding persons to involuntary servitude by picking up individuals under false pretences, delivering them to labour camps in North Carolina and Florida, requiring them to work long hours for little or no pay, and keeping them in the camps through poverty, threats and acts of violence. The government introduced evidence at trial to show that disobedient workers were beaten, threatened with a gun or a smouldering piece of rubber hose, and denied food or medicine as punishment for failure to work as expected by the camp operators. Several workers were able to leave the camp only after a nun arranged for them to obtain money from family members whom the workers had been unable to contact on their own. The Eleventh Circuit Court of Appeals upheld the convictions. United States v. Warren, 772 F.2d 827 (11th Cir. 1985).

193. The "vulnerable person" cases typically involve victims whom the defendants are able to hold in a condition of involuntary servitude based in part on some specific characteristic of the victim. Persons with particular vulnerabilities include illegal immigrants, elderly or very young persons and mentally retarded persons.

194. In United States v. Vargas, a 1991 prosecution in the Southern District of California, three defendants were convicted on one count of holding a person to involuntary servitude. Claudia Vargas recruited 17-year-old Juanita Hernandez-Ortiz, in Mexico City, Mexico, in 1989 to work as a maid for her family, first in Mexico and then in the United States. The defendants originally agreed to send money to Ms. Hernandez' family, to give her room and board, and, eventually, to send her to school. Instead, the Vargases forced Ms. Hernandez to enter the country illegally, then took all of her identification documents and threatened to turn her over to immigration officials. Throughout 1990 and 1991, the defendants' physical abuse of Ms. Hernandez escalated. Raul Vargas on one occasion used a broom handle to beat Ms. Hernandez, and his mother tore clumps of hair from Ms. Hernandez'

head. By April 1990, the defendants were forcing Ms. Hernandez to live in the garage, locking her in with little or no food when they would be gone for days at a time. A county child protective services worker eventually took Ms. Hernandez from the Vargas home.

195. Migrant worker and vulnerable person cases are not the only involuntary servitude prosecutions pursued by the Department of Justice. In United States v. Lewis, the Department prosecuted eight leaders of a religious sect known as the House of Judah for their activities in forming and monitoring work details among the male children who lived on the sect's compound in rural western Michigan. The sect leaders, including prophet William Lewis (also known as My Lord Prophet) and members of his leadership council prohibited members from leaving the compound, assigned persons to patrol the perimeter of the compound with weapons, and publicly beat members who refused to obey commands, attempted to leave or otherwise displeased sect leaders. The young male children were assigned to work details and were beaten when they did not work or performed their work poorly. Twelve-year-old John Yarbough died five days after one of the beatings he received for failing to report for assigned work. All seven defendants who went to trial were convicted on charges of conspiring to hold John Yarbough to involuntary servitude and of holding John Yarbough and others to involuntary servitude; the eighth defendant pleaded guilty prior to trial. United States v. Lewis, 644 F. Supp. 1391 (W.D. Mich. 1986).

196. One of the major issues in the Lewis case was how the presence of the children's parents, also members of the sect, at the compound affected the defendants' culpability. In affirming the convictions in Lewis, the Sixth Circuit Court of Appeals held that the defendants did not share the immunity of the children's parents based on the parents' right to discipline their children. United States v. King, 840 F.2d 1276, 1280 (6th Cir. 1988).

197. In another case involving the holding of children in involuntary servitude, United States v. Van Brunt, the Department of Justice successfully prosecuted eight defendants who were leaders of a pseudo-religious/athletic cult based in Los Angeles, California, and Clackamas County, Oregon. These defendants were indicted in Oregon on charges involving the systematic physical abuse of over 50 children. The children were coerced into performing arduous athletic accomplishments to attract corporate financial support and sponsorship for the cult. All the children of cult members were allegedly abused, including the daughter of Eldridge Broussard, the group's founder and leader, who died as a result of a severe beating. A few months later, following the indictment, Eldridge Broussard died of natural causes. All seven of the remaining defendants pleaded guilty a month before trial was scheduled and were sentenced to serve prison terms of 2¼ years to over 8 years.

198. Since 1977, the Department of Justice has prosecuted 28 involuntary servitude cases involving 100 defendants. The cases have resulted in 36 convictions and 46 guilty pleas.

199. Hard labour. Hard labour is no longer available as a criminal sanction under federal criminal law, though it remains a possible punishment under the Uniform Code of Military Justice and some state laws. In these jurisdictions, a judge may sentence a person to "a term of imprisonment with hard labour".

There is no specific constitutional or statutory prohibition against hard labour. The Eighth Amendment, as discussed above, prohibits the infliction of any punishment that is "cruel and unusual". While hard labour does not necessarily constitute cruel and unusual punishment, prison work requirements which compel inmates to perform physical labour which is beyond their strength, endangers their lives, or causes undue pain constitute cruel and unusual punishment. Ray v. Mabry, 556 F.2d 881 (8th Cir. 1977). The Supreme Court has, on more than one occasion, found hard labour to be an excessive punishment grossly disproportionate to the crime for which it was imposed. Weems v. United States, 217 U.S. 349 (1910).

200. Several states possess the statutory authority to place offenders in programmes that employ "hard labour". While the term "hard labour" has remained unaltered in a few states, the U.S. military services, and some U.S. territories, "hard labour ... [is] not correspondent to work in the stocks or other eighteenth century punishments which were then considered reasonable". Justiniano Matos v. Gaspar Rodriquez, 440 F. Supp. 673, 675 (D. Puerto Rico 1976). In theory, "hard labour" refers to a form of punishment and suggests more than mere institution work assignments. In practice, however, the jobs assigned to prisoners sentenced to "hard labour" are often the very same as those assigned to prisoners sentenced to a term of imprisonment. In the majority of states and territories where the "hard labour" terminology has survived, courts and corrections agencies have translated the sanction into modern community corrections programmes (halfway house placement, work release, boot camps, etc.). There are typically four placement alternatives for offenders sentenced under hard labour statutes: (i) correctional institution work crew, (ii) work release programme with a local building contractor, public agency, sanitation crew, etc., (iii) apprenticeship programme with a mentor skilled in a particular trade, or (iv) vocational training.

201. An example of a work programme where an offender could be placed is provided by the Home Builders Institute (HBI), the educational arm of the National Association of Homebuilders. HBI provides a "Project Trade" programme for adult offenders in prison and a "Job Corps" programme for juveniles in trouble. Offenders typically receive remedial education, vocational training, counselling, and health care. These programmes are designed "to turn America's hardest-to-employ" into productive, independent citizens through classroom and work assignments in 11 separate construction trade training programmes. See HBI "Project Trade Abstract", Washington, D.C., Home Builders Institute.

202. **Forced labour**. The United States does not engage in practices of forced labour. On 7 June 1991, the United States ratified International Labour Organisation Convention No. 105 concerning the abolition of forced labour. The Convention, which entered into force for the U.S. on 25 September 1992, requires ratifying states to undertake to suppress and not make use of forced labour in five specific cases: as a means of political coercion or education, or as punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a method of mobilizing and using labour for purposes of economic

development; as a means of labour discipline; as punishment for having participated in strikes; and as a means of racial, social, national or religious discrimination.

Article 9 - Liberty and security of person

203. Arrest and detention: general. Both the U.S. Constitution and a number of statutes and rules of criminal procedure protect individuals against arbitrary arrest and detention. The Constitution greatly restricts the ability of the government at all levels to infringe on the liberty of its citizens; several provisions bear directly on the power to arrest and detain. The Fifth Amendment provides that no person shall be "deprived of ... liberty ... without due process of law". Similarly, the Fourteenth Amendment provides that no state shall "deprive any person of ... liberty ... without due process of law". The Fourth Amendment provides that all persons shall be free from unreasonable searches and seizures, and "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". Finally, the Sixth Amendment provides that in all criminal prosecutions, the accused shall be given a "speedy and public trial, by an impartial jury of the state", and persons shall be "informed of the nature and cause of the accusation" brought against them. These constitutional protections apply (with one exception not relevant to this inquiry) to the states under the Due Process clause of the Fourteenth Amendment. See Wolf v. Colorado, 338 U.S. 25, 27-28, 33 (1949); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (Fifth Amendment privilege against self-incrimination); Benton v. Maryland, 395 U.S. 784, 793-96 (1969) (Fifth Amendment double jeopardy clause); Hurtado v. California, 110 U.S. 516, 535 (1884) (Fifth Amendment due process clause); Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967) (Sixth Amendment speedy trial clause); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (Sixth Amendment right to counsel).

204. The constitutional provisions described above form the bases for strict rules regarding the arrest and detention of suspects in the United States; these rules are applied and enforced at all levels of government. First, persons may be detained upon a finding that there is probable cause to believe they have committed a crime. A judicial officer must authorize such detention either by issuing a warrant for the person's arrest, or by approving such arrest shortly after it occurs. Subsequently, the judicial officer must authorize the continued detention of the person following a hearing wherein it is determined whether there is reason to believe the suspect will flee from justice or will pose a threat to the public if released. There is usually a presumption that the person shall be released pending trial with or without executing an appearance bond although exceptions may exist where the crime is particularly heinous. See, e.g., 18 U.S.C. sections 3142 et seq.

205. Additionally, states through their separate laws guarantee that individuals will not be arbitrarily arrested and detained by state authorities and also require prompt notification of charges and a speedy trial. States are obligated at a minimum to adhere to the requirements of the U.S. Constitution, but they may adopt greater protections in their own statutes or state constitutions.

206. **Arrest**. In the United States, a person ordinarily may be deprived of liberty for only a brief period unless such person (i) has been formally arrested and charged, by complaint or indictment, with a crime, or (ii) refuses to obey a lawful court order (but only for as long as he refuses to obey). The primary protection against the government's unwarranted deprivation of a person's liberty is in the Fourth Amendment to the Constitution. It provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

207. The Fourth Amendment requires two things: (i) the arrest must be "reasonable" and (ii) an arrest effected by a warrant must be backed by a showing, under oath, of probable cause and a particular description of the person to be arrested. The "seizure" of a person under the Fourth Amendment can include a formal arrest or a detention by government officials where, under the totality of the circumstances, the person reasonably believes that he or she is not free to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

208. The Fourth Amendment does not require that an arrest be effected by a judicially authorized warrant. Whether the arrest is made with or without a warrant, the Amendment requires that there be probable cause. Probable cause exists when the police have knowledge or information of facts and circumstances sufficient to allow a person of reasonable caution to believe that an offence has been or is being committed by the person to be arrested. Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar v. United States, 338 U.S. 160, 175-76 (1949). In this respect, U.S. law and practice does not permit "preventive detention".

209. A police officer may arrest a person without first securing a warrant or a complaint if, for example, he observes the person engaged in the commission of a crime. However, the officer must then promptly swear out a complaint before a judge or magistrate. Fed. R. Crim. P. 3 describes a complaint as "a written statement of the essential facts constituting the offence charged". In addition, a person who has been arrested or otherwise subject to significant restraints on his liberty is entitled to a hearing before a judge or magistrate; the judicial officer determines whether a prudent person would conclude that there is probable cause to believe that the accused committed the offence. Gerstein v. Pugh, 420 U.S. 103 (1975).

210. If the police officer seeks a warrant prior to arrest, a judicial officer will issue a warrant or summons if he finds (in the complaint or affidavits appended to the complaint) probable cause to believe that the defendant committed the alleged crime. Under Fed. R. Crim. P. 4(c), the warrant must describe with particularity the person to be arrested and the offence, and it must direct that the person then be brought before the nearest available magistrate.

211. The requirement that arrests not be effected absent probable cause and that an independent and neutral judicial officer make the probable cause determination goes far to protecting against arbitrary detention in criminal cases. Nor may a person be arrested, whether or not he is to be detained in custody, without being promptly informed of the basis for the arrest and detention.

212. Reasons for arrest and detention. Federal law requires that the arrestee must be given a copy, immediately upon arrest, of the arrest warrant (if the arresting officer has a copy) or, at a minimum, must be informed of the offence charged and given an opportunity to see the warrant as soon as practicable. Fed. R. Crim. P. 4(d)(3). In the case of warrantless arrest, the arresting authority generally must inform the arrestee of the cause of his arrest. State practice is similar. There may be exceptions for state arrests, however, in the limited circumstances where the arrest is for an offence committed in the actual presence of the arresting officer or person, or the officer arrests the person after an immediate and hot pursuit or after an escape. See, e.g. People v. Beard, 46 Cal.2d 278, 294 P.2d 29 (1956).

213. Right to counsel. In addition, the requirement that the accused be provided assistance of counsel promptly in a criminal case protects against arbitrary detention. First, under the Fifth Amendment and the rule imposed by the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 444, 478-79 (1966), before questioning a person in "custody", police officers - state and federal - must inform the person that he or she has a right to remain silent, that any statements he or she makes can be used against him or her at a criminal trial, that he or she has the right to the presence of a lawyer, and that if he or she cannot afford a lawyer one will be appointed. "Custody" for purposes of Miranda does not necessarily require that the person be formally arrested and charged; it is sufficient if his or her freedom of action has been deprived in any significant way. Miranda, 384 U.S. at 444. Nor does it matter whether the custodial interrogation is focusing on a major crime or a minor violation. Some types of detention, however, may be so insignificant, such as a routine traffic stop, that Miranda warnings are not required because the defendant is not deemed in custody. Berkemer v. McCarthy, 468 U.S. 420, 441-2 (1984).

214. By operation of Miranda, once a person requests the assistance of a lawyer during questioning the interrogation must stop until counsel is provided. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). While there is no requirement that counsel be promptly provided, there can be no continued custodial interrogation without counsel. In the event the person in custody wishes to speak with an attorney and is denied the opportunity to do so, any evidence the police obtain - either directly or as a "fruit" of the initial statement - as a consequence of the denial of counsel will be excluded at trial.

215. In addition to the requirement under Miranda that persons in custodial interrogation situations be informed of their right not to answer questions and their right to the presence of an attorney, the Sixth Amendment requires that "in all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence". The Supreme Court has ruled that the Sixth Amendment right to counsel is triggered by the initiation of adversarial

judicial proceedings against the accused, either by formal charge, preliminary hearing, indictment, information, or arraignment. Kirby v. Illinois, 406 U.S. 682, 689 (1972). This provision applies to the states as well. Gideon v. Wainwright, 372 U.S. 335 (1963).

216. The protections of Miranda v. Arizona as well as Gideon v. Wainwright and other Sixth Amendment cases generally are invoked to guarantee that persons who are not already represented will receive the assistance of counsel. Should a detainee already have an attorney and wish to contact that attorney, no statute or rule prohibits him from doing so, even though that person's constitutional right to counsel may not yet have attached. If for some reason the request to contact his attorney is not immediately honoured, the government will be barred from using as evidence any statements the detainee made to officers in response to questioning after the attempt to contact the lawyer; the government also cannot use information derived from those statements.

217. **Initial appearance**. At both the federal and state levels, all persons who have been arrested or detained must be brought before a judicial officer promptly even when the arrest has been made pursuant to a warrant issued upon a finding of probable cause. Officers who arrest a person without a warrant must bring that person before a magistrate for a judicial finding of probable cause within a reasonable time. Gerstein v. Pugh, 420 U.S. 103 (1975). Though "reasonable time" is undefined, the Supreme Court has held that it generally cannot be more than 48 hours, see County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991). Some states may apply more stringent statutory or constitutional requirements to bar detention for even that length of time. If there is "unreasonable delay" in bringing the arrested person before a magistrate or judge for this initial appearance, confessions or statements obtained during this delay period may be excluded from evidence at trial.

218. Not all delay over 48 hours will be deemed unreasonable. For example, the Supreme Court suggested in one case that a delay of three days over a three-day holiday weekend was not violative of the person's due process rights. Baker v. McCollan, 443 U.S. 137, 145 (1979). In other instances, for example when the police seek to check the defendant's story, delay greater than 48 hours may also be found to be reasonable. Mallory v. United States, 354 U.S. 449, 455 (1957).

219. In arrests for violations of federal law, Fed. R. Crim. P. 5 requires that an arresting officer bring the accused before the nearest available magistrate without unnecessary delay. If a federal magistrate or judge is not available, the person must be brought before a state or local official. See 18 U.S.C. section 3041; Fed. R. Crim. P. 5(a). At this proceeding, called an "initial appearance", the judge or magistrate informs the accused of the charges against him, informs the suspect of his right to remain silent and the consequences if he chooses to make a statement, his right to request an attorney or retain counsel of his choice, and of the general circumstances under which he may obtain pretrial release. Fed. R. Crim. P. 5(c). The magistrate will also inform the accused of his right to a preliminary hearing, assuming that the person has not yet been indicted by a grand jury, and allow reasonable time to consult with his attorney. Fed. R. Crim. P. 5(c).

220. **Pretrial release**. In the federal system and the various states, the general rule is that persons awaiting trial will not be detained in custody unless the judicial officer cannot be assured that there are conditions of release that will reasonably guarantee the safety of the public and the appearance of the person at the criminal trial. Since the amount of bail is not the only factor in determining the risk that a charged person would flee before trial, his financial status may not be the overriding concern. Courts frequently take into account such other factors as the seriousness of the crime (and the severity of the penalty the person is likely to face if convicted), the strength of the evidence, and the individual's ties to the community in assessing the likelihood that he will appear at his trial.

221. A person lacking the financial means to secure release by a cash bond or by arranging for a bail bondsman to act as a surety may be released on other conditions which might reasonably guarantee appearance at trial. Such conditions may include requirements to report regularly to a designated law enforcement or pretrial services agency, to limit his travels or remain under house arrest, to comply with a curfew, and the like. The court may also impose conditions of release that are designed to protect the public safety, such as prohibitions against contacting or associating with certain individuals.

222. If release on bail is ordered, the amount of bail should be set at a figure sufficient to guarantee the person's availability at trial. Stack v. Boyle, 342 U.S. 1, 4 (1951). A person with fewer assets would, theoretically, be as unwilling to forfeit all his property as a person with substantial assets. Under that analysis, bail could be set at a much lower figure for the detainee of lesser wealth. However, as a practical matter courts may have less confidence in ordering low bail or alternatives to the pledging of property for persons who pose a risk of flight for other reasons, such as the aforementioned severity of the crime and lack of community ties, and who also lack substantial financial assets that would be risked by pretrial flight.

223. In federal courts, the Bail Reform Act, 18 U.S.C. sections 3141 et seq., provides that, except for the categories of particularly dangerous persons or persons likely to flee if not detained, defendants awaiting trial can be released on personal recognizance, upon the execution of an unsecured appearance bond, or upon other conditions. The other conditions may include a requirement that the defendant remain in the custody of a designated custodian or that the defendant's movements be subject to electronic monitoring, that the defendant restrict his travel outside the jurisdiction, that the defendant post a cash bond or pledge property as security for his promise to appear at trial, or that the defendant execute a bail bond with a solvent surety.

224. The Bail Reform Act also provides that when a judicial officer "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial". 18 U.S.C. section 3141(e). In certain circumstances the statute allows a rebuttable presumption against release pending trial. 18 U.S.C. section 3142(e),(f)(1). The rebuttable presumption arises if (i) within the past five years the defendant while released pending trial on another matter, had committed a crime of violence, a crime for which the maximum sentence was life

imprisonment or the death penalty, a serious drug felony, or (in conjunction with other circumstances) any other felony, or (ii) the judge finds probable cause to believe that the defendant committed a serious drug or firearms felony. Subject to rebuttal by the defendant, the court shall find that no condition or combination of conditions will reasonably assure the appearance of the person if released before trial or the safety of any other person and the community. The court may also deny release pending trial if it finds a serious risk of flight or that the defendant will obstruct or attempt to obstruct justice, or threaten or attempt to threaten, injure, or intimidate a prospective witness or juror. 18 U.S.C. section 3142(f)(2).

225. At a detention hearing under the statute, the arrested person has the right to counsel, to cross-examine witnesses called by the government, and to testify and present witnesses and evidence on his behalf. If after the hearing the judicial officer finds that no conditions of pretrial release can reasonably ensure the safety of other persons and the community, he must state his findings of fact in writing and support his conclusions with "clear and convincing evidence". 18 U.S.C. section 3142(f), (i). The statute further spells out the factors that the judicial officer must consider: the nature and seriousness of the charge, the strength of the government's evidence, the detained person's background and characteristics, and the nature and seriousness of the danger that would be posed if the detained person was released. 18 U.S.C. section 3142(g).

226. A person subject to pretrial detention - either because the individual cannot "make" the bail which has been set or because the court has declined to release him under any circumstances - may appeal to a higher court. Stack v. Boyle, supra. Under federal law, if the person is ordered detained by a magistrate, he may file a motion with the district court for revocation or amendment of the order. The statute requires that the motion shall be determined "promptly". 18 U.S.C. section 3145(b). If the district court denies the motion, he may appeal the order to the court of appeals. That appeal too shall be determined "promptly". 18 U.S.C. section 3145(c). The remedy of appeal is guaranteed to persons regardless of their ability to pay for an attorney; an indigent defendant who wishes to appeal the decision will be assisted by court-provided counsel, and the indigent appellant will not have to pay any court costs or filing fees in order to perfect his appeal.

227. Approximately 62 per cent of federal offenders were released prior to disposition of their cases in 1990. Of those who were not released, two thirds were denied bail and were detained after a hearing at which it was determined that they posed a danger to the community. Defendants denied pretrial release because of their potential danger were held an average of 88 days before disposition of their cases.

228. State procedures for setting and making bail are relatively similar to the federal process, although there are significant variations in law and practice among the 50 jurisdictions. States take into account different factors in setting bail, and some have no statutory factors for setting bail. None the less, certain factors are usually considered, including the seriousness of the offence, the strength of the case against the suspect, and

the suspect's prior criminal record. Bail is usually arranged through a cash payment, an agreement with a bail bondsman, or on the suspect's personal recognizance.

229. In 1990, an estimated 65 per cent of defendants facing felony charges in the nation's 75 most populous counties were released prior to the disposition of their cases. More than half were released within a day of arrest, and 80 per cent were released within a week of their arrest. Of the 35 per cent who remained in custody pending disposition of their criminal cases, approximately one in six defendants was denied release on bail; the other five in six were unable to post the required bail amount. Felony defendants detained prior to disposition were held in custody for an average of 37 days.

230. **Right to speedy trial**. In addition to providing the protection of the right to counsel, the Sixth Amendment also guarantees that "[in] all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...". This speedy trial protection applies to state as well as federal prosecutions. In federal courts, the right is implemented by the Speedy Trial Act, 18 U.S.C. sections 3161 et seq. Many states have adopted similar statutes. The right to speedy trial is discussed in greater detail under article 14.

231. **The military justice system**. In military jurisprudence, the apprehension and restraint of individuals are addressed in the Uniform Code of Military Justice, articles 7 through 14, 10 U.S.C. sections 807-14. The civilian term "arrest" is equivalent to the military term "apprehension". Under the Uniform Code of Military Justice (UCMJ), article 7, 10 U.S.C. section 807, an individual may be apprehended only upon reasonable belief that an offence has been committed and that the person apprehended committed it.

232. This matter is expounded in Rule for Court-Martial 302, Manual for Courts-Martial (1984). This rule details that warrants are not required for apprehension (except in certain cases involving private dwellings) and that reasonable force may be used to effect the apprehension.

233. The imposition of restraint is effected pursuant to UCMJ, article 9, 10 U.S.C. section 809, and is more particularly described in Rule for Court-Martial 304, Manual for Courts-Martial. Pretrial restraint is moral or physical restraint on a person's liberty and may consist of, in order of increasing severity: conditions on liberty (orders directing a person to do or refrain from doing specified acts), restriction in lieu of arrest (orders directing the person to remain within specified limits, while still performing full military duties), arrest (orders directing the person to remain within specified limits, while not performing full military duties), and confinement (physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges).

234. Rule for Court-Martial 305 discusses pretrial confinement in great detail. Only a commanding officer, to whose authority a civilian or officer is subject, may order pretrial restraint of that civilian (subject to trial by court-martial) or officer. Any commissioned officer may order the pretrial confinement of an enlisted member. An individual may be ordered into pretrial

confinement only if there is probable cause to believe that an offence triable by court-martial has been committed, the person confined committed it, and confinement is required by the circumstances.

235. The person confined must be notified immediately of the nature of the offence charged; the right to remain silent and that any statement made may be used against such person; the right to retain civilian counsel at no expense to the government; the right to military counsel at no cost; and procedures for review of the pretrial confinement.

236. Within 72 hours of ordering an individual placed into pretrial confinement or being notified that a member of the unit is in pretrial confinement, the commander must decide whether or not the confinement will continue. The commander must order the prisoner's release unless the commander believes upon probable cause that a court-martial offence has been committed; the prisoner committed it; confinement is necessary because it is foreseeable that the prisoner will not appear at trial proceedings; the prisoner will engage in serious criminal misconduct; and less severe forms of restraint are inadequate.

237. Within seven days of the imposition of the restraint, a review must be conducted of the adequacy of probable cause to believe the prisoner has committed an offence and of the necessity of continued pretrial confinement. The review is conducted by a neutral and detached officer, who must consider the confining commander's decision, written matters, and any presentation made by the prisoner and the prisoner's counsel, who are allowed to appear at the review.

238. Once the charges for which the prisoner is being held are referred to trial by court-martial, the pretrial confinement is subject to review by the military judge. Should the judge determine the pretrial confinement resulted from an abuse of discretion, the military judge shall order administrative credit for any pretrial confinement served as a result of the abuse. There is no avenue for compensation to a prisoner who is determined to have been wrongly confined.

239. Under Rule for Court-Martial 707, the prisoner must be brought to trial within 120 days of the imposition of restraint. Pretrial confinees and post-trial confinees may be quartered in the same facility and may use common areas (such as dayrooms), but their actual quarters must be separate. Habeas corpus procedures are available to an accused through Federal District Court.

240. Recently, Congress enacted a "bill of rights" for military members who are required to submit to a mental health examination (National Defense Authorization Act, Pub L. No. 102-484, 106 Stat 2315, 1506 (1992)). The commander must consult a mental health professional prior to referring a member for a mental health evaluation. The commander must provide the member with a written notice that includes an explanation for the referral, the name of the mental health professional consulted by the commander, and how to contact an attorney or inspector general for assistance in challenging the referral. The member may have an attorney to assist in redress; have the assistance of the inspector general to review referral; and be evaluated by a

mental health professional of the member's own choosing. The Act prohibits using mental health referrals against members for whistle blower activities. It also includes special procedures for emergency or inpatient evaluations. The Act requires the Secretary of Defense to revise applicable regulations to incorporate these requirements. These requirements do not become effective until the regulation revision is completed.

241. Detention to secure the presence of a witness. A person may also be held in custody to secure his presence as a material witness at an upcoming trial. The Supreme Court has stated that the "duty to disclose knowledge of crime ... is so vital that one known to be innocent may be detained in the absence of bail, as a material witness". Stein v. New York, 346 U.S. 156, 184 (1953). Federal law accordingly has a material witness statute, 18 U.S.C. section 3144, that provides:

> "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of [the Bail Reform Act]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."

242. Custody of the witness may be obtained by means of an arrest warrant secured from a judge upon a showing of probable cause to believe that the testimony of the witness is material and that it may be impracticable to secure the witness's presence by subpoena. Bacon v. United States, 449 F.2d 933, 937-39 (9th Cir. 1971); United States v. Coldwell, 496 F. Supp. 305, 307 (E.D. Okl. 1979); United States v. Feingold, 416 F. Supp. 627, 628 (E.D.N.Y. 1976). Where a material witness is held in custody under that provision, the prosecutor is obligated to make a bi-weekly report to the court explaining why it is necessary that the witness continue in detention in lieu of giving a deposition under the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 46(g). In addition, the witness held in custody must be given appointed counsel if the witness is financially unable to afford a lawyer. In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western Dist. of Texas, 612 F. Supp. 940, 943 (W.D.Tex. 1985).

243. Detention for contempt of court. A person may also be held in custody as a means of ensuring compliance with a court order. The decision to take a contemner into custody is reserved for the judge, and is subject to appeal to a higher court. Courts have the inherent power to enforce compliance with their lawful orders through civil contempt. Shillitani v. United States, 384 U.S. 364, 370 (1966). A finding of civil contempt and the remand of the individual into custody solely for the purpose of coercing obedience to lawful orders is not viewed as criminal punishment. Id. Court-ordered detention under its civil contempt powers may continue indefinitely but not forever. United States ex rel. Thom v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985). The

continued incarceration must be subject to court review at reasonable intervals or when requested by either party. Moreover, the decision to maintain a person in custody in order to compel his compliance is appealable to a higher court; the standard of review of a trial court civil contempt sanction is the abuse of discretion standard: if there is clear and convincing evidence of the contemner's violation of a court's prior lawful order, the trial court would have broad discretion in finding civil contempt and imposing sanctions, and the finding and the sanction would be reversed only for abuse of discretion. Peppers v. Barry, 873 F.2d 967, 968 (6th Cir. 1989); Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989); United States v. Hefti, 879 F.2d 311, 315 (8th Cir. 1989), cert. denied, 110 S.Ct. 1125 (1990).

244. **Commitment for mental disease**. Persons suffering from a mental disease or defect may be detained and treated based upon a judicial finding that the release of such persons would be dangerous to themselves or others. "Involuntary civil commitment" is the process by which individuals alleged to have a mental illness or other mental impairment are deprived of their liberty and confined to an in-patient hospital setting for treatment.

245. The U.S. Supreme Court has held that persons who have not been convicted or suspected of any criminal conduct may be detained if it can be determined that, by reason of a mental disease or defect, they are likely to cause harm to themselves, or to others. United States v. Addington, 441 U.S. 418 (1978). All states have civil commitment statutes that allow a person to be committed to a mental health facility for treatment and care. Because such statutes permit the state to deprive citizens of their liberty, the state is required to satisfy an exceptionally high standard of proof, illustrating both the mental state of the individual and the imminent danger posed by the person. As the Supreme Court noted in 1978, "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence". United States v. Addington, supra, at 427. Most states require "clear and convincing" evidence to be presented, others possess a "clear, cogent, and convincing" standard, and a few states require an even higher standard of "clear, unequivocal and convincing" proof.

246. While the states and the federal government retain the power to commit individuals in the various circumstances noted above, the U.S. Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection". United States v. Addington, supra, at 425; see also Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); In re Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967). Recognizing the unique, non-criminal status of individuals detained in this manner, the Supreme Court has affirmatively noted that "in a civil commitment state power is not exercised in a punitive sense". United States v. Addington, supra, at 428.

247. The same rules apply to the states. State law usually requires, as a prerequisite to involuntary confinement, proof that patients have a mental disability that renders them dangerous to themselves or others, or, less

commonly, gravely disabled and unable to care for basic needs. The process is initiated when a third party petitions a local court asking the court to commit an individual. Following receipt of the petition, the court holds a hearing to determine whether the individual whose commitment is sought meets the jurisdiction's commitment standard. An emergency commitment can be ordered without a hearing for a period of time which is usually 72 hours. Allegedly mentally ill individuals are represented by counsel in these proceedings, but other procedural requirements vary from state to state. In addition, the Miranda rule described above applies to state custodial interrogations. See, e.g., Etelle v. Smith, 451 U.S. 454 (1981).

248. Voluntary commitment includes procedures where individuals sign themselves into a facility for treatment as well as actual third-party-initiated commitments or admissions to hospitals. State statutes typically permit the superintendent of a facility to admit an individual if the superintendent believes the person to be "suitable for admission", and parents may commit their dependent children through various procedures without a court hearing. The U.S. Supreme Court has held, however, that the deprivation of liberty involved in so-called voluntary commitment requires that a neutral fact-finder determine the child's suitability for commitment. Parham v. J.R., 442 U.S. 584 (1979).

249. A person who is acquitted on a criminal charge by reason of insanity may continue to be confined after acquittal only after a determination that the individual is both mentally ill and dangerous. Foucha v. Louisiana. 112 S.Ct. 1780 (1992).

250. All states provide patients with the right to habeas corpus to contest the legality of their commitments. Moreover, state statutes afford patients a right to have the need for their confinement reviewed periodically. These statutes are an outgrowth of the Supreme Court's holding in Donaldson v. O'Connor, 422 U.S. 563 (1975), that even where an individual's initial commitment may have been founded on a legally adequate basis, confinement cannot continue after the basis no longer exists.

251. Detention of illegal immigrants. Non-citizens who are apprehended attempting to enter the United States illegally (excludable aliens) or who are apprehended following entry into the United States (deportable aliens) may be detained pending exclusion or deportation hearings or returned to their home countries. Detention is generally based on the conclusion that a particular alien poses a danger to the community or is likely to abscond.

252. In the case of some excludable aliens who have committed serious crimes in the U.S. and have served their criminal sentences, or who have serious mental illnesses, immigration detention has lasted for considerable periods due to concerns that the particular aliens involved pose a danger to the community and the refusal of their home country to accept them back. Their detention, which is currently authorized under section 236(b) of the Immigration and Nationality Act, has repeatedly been challenged as unauthorized by law, unconstitutional or arbitrary and in violation of international law, with limited success to date. See Alvarez-Mendez v. Stock, 746 F. Supp. 1006, aff'd 941 F.2d 956 (1992), cert. denied, 113 S.Ct. 127 (1992) (general principles of international law allegedly forbidding arbitrary

detention were not applicable to detention of Cuban national found excludable and deportable; detention to protect society is not punishment); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), cert. denied, Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986) (the Attorney General has implied authority to detain excludable aliens indefinitely); but see Barrera-Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994), pet. reh'g. filed (16 May 1994) (granting habeas corpus to a Mariel Cuban).

253. Both excludable and deportable aliens in the United States have a right to apply for habeas corpus (see below), as well as political asylum and withholding of exclusion/deportation. The application of U.S. immigration law to illegal aliens, and their rights in immigration proceedings, are discussed in detail under article 13.

254. **Habeas corpus relief**. The procedures set out above guarantee that throughout the U.S. a neutral judge will promptly and repeatedly be available to make judgements about the lawfulness of detention. In addition, habeas corpus is an historic remedy available to persons subject to restraint of their liberty. Hensley v. Municipal Court, 411 U.S. 345, 351 (1973). Art. I, section 9, cl. 2 provides that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it". Through habeas corpus a person may obtain an immediate judicial hearing on the legality of the detention and an order directing the official who holds him in custody to release him, if appropriate. Wales v. Whitney, 114 U.S. 564, 574 (1885). In particular, a person in custody who has not been formally arrested and provided a preliminary hearing, as is required by law, may seek immediate release through an application for a writ of habeas corpus that he may file in either federal or state court. See United States ex rel. Davis v. Camden County Jail, 413 F. Supp. 1265, 1268 n.3 (D.N.J. 1976).

255. The process for obtaining habeas corpus relief is less onerous than other remedies; the Supreme Court has emphasized that the "very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected". Harris v. Nelson, 394 U.S. 286, 291 (1969); Hensley v. Municipal Court, 411 U.S. at 350.

256. The right of a person to habeas corpus relief generally depends on the legality or illegality of his detention, i.e. whether the fundamental requirements of law have been complied with, and not on the underlying issues of guilt or innocence. However, the fundamental requirements of the law require that a person cannot be subject to detention unless a neutral and detached magistrate makes an independent finding that there is sufficient probable cause to believe that person committed an offence. Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

257. Because there are other constitutional and statutory guarantees, the writ of habeas corpus is little used in practice as a remedy for protecting detainees in criminal cases. The writ can also be used to review a final conviction - in addition to the statutory right to appeal one's conviction - as well as to challenge execution of a sentence or to challenge confinement

that does not result from a criminal conviction, such as the commitment into custody for mental incompetency or detention for immigration reasons.

258. Right to compensation. U.S. law at the federal and state levels provides ample remedies to victims of unlawful arrests and other miscarriages of justice. As described under article 2, victims of unlawful arrest or detention may collect damages from federal law enforcement officials for violations of their constitutional rights, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Congress has by statute provided for similar relief against state officials, 42 U.S.C. section 1983. Victims also have rights to compensation against state officials under provisions of state law. In both contexts, the defendants to such actions may raise the defence of qualified immunity, which is designed to protect the discretion of law enforcement officials in the exercise of their official functions. In some instances, immunity has been waived by statute, such as the Federal Tort Claims Act. In other cases, compensation may be available through insurance, or by special act of the legislature. There is, however, no constitutional or statutory requirement of compensation for all persons who have been arrested unlawfully. For this reason, and because the U.S. Government believes that few, if any, states actually provide an absolute right of compensation to all victims of unlawful arrest regardless of the circumstances, the U.S. conditioned its acceptance on the following understanding:

> "The United States understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law."

Article 10 - Treatment of persons deprived of their liberty

259. Humane treatment and respect. As discussed in connection with article 7, the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution, as well as federal and state statutes, regulate the treatment and conditions of detention of persons deprived of their liberty by state action. In addition, as discussed below, at both the federal and state levels a number of mechanisms exist to ensure that, through enforcement of their constitutional and statutory rights, prisoners are treated with humanity and respect for their dignity, commensurate with their status.

260. In all criminal correctional systems, the policies and practices of prison staff are governed by official regulations. These regulations are based on U.S. and state constitutional requirements, and, with the exception of rules dealing exclusively with staff or security issues, are generally available to inmates through inmate libraries. Few if any systems' regulations comply with every provision of the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials, but most do substantially comply. For example, most U.S. department of corrections' regulations do not incorporate the

United Nations standard that no male staff shall enter a women's institution unless accompanied by a woman. None the less, the important underlying issue of sexual abuse is addressed through staff training and through criminal statutes prohibiting such activity. For example, federal correctional officers are given training regarding appropriate behaviour towards inmates of the opposite sex, and 18 U.S.C. section 2243 provides that anyone who engages in a sexual act with a person in a federal prison may be subject to a fine and/or a term of imprisonment.

261. As evidenced by the many successful suits that have been brought to enforce detainees' rights, the actual practice of detention in the United States frequently does not meet constitutional standards. Overcrowding in country jails is a perpetual problem, especially as the federal government often must rely upon those jails for pretrial detention. When prison policies are, on their face, inconsistent with constitutional provisions, or when the conduct of staff does not comport with policy, prisoners generally can bring their complaints to the attention of prison administrators through internal grievance procedures. A prisoner can also file suit in the appropriate federal or state court. Additionally, there are less formal mechanisms of complaint, such as writing letters to government representatives or to private activists apprising them of inmate concerns. Inmates are also afforded liberal access to the media through both written correspondence (28 C.F.R. section 540.20 (C)) and in-person interviews. In many instances these informal mechanisms give rise to internal and outside investigations of prison conditions and procedures.

262. With regard to civil commitments, current statutes and judicial decrees typically involve a host of procedural safeguards, including notice to relevant individuals, judicial hearings, representation of counsel, and presentation of evidence and cross-examination of adverse witnesses. Multiple opinions from mental health professionals are almost always required. Individuals detained as a result of their mental state are given appropriate mental health treatment and are regularly evaluated for possible release.

263. Correctional systems: federal government. Individuals convicted of federal crimes are sentenced by U.S. District Courts to the custody of the United States Attorney General. The Attorney General is appointed by the President and confirmed by the U.S. Senate, and manages the U.S. Department of Justice (DOJ). The Attorney General delegates custody responsibilities to the Federal Bureau of Prisons (BOP). The Director of the Bureau of Prisons retains full administrative responsibility for offenders designated to the Attorney General's custody.

264. The BOP operates nearly 80 correctional facilities across the United States. Offenders are placed in institutions based upon a host of factors, including the severity level of their offences, their criminal history, and any special needs or requirements. Persons being detained prior to their trial, or while waiting for their immigration hearings, are normally designated to special "detention" facilities or housing units within correctional institutions. These inmates are, to the extent practicable, managed separately from convicted offenders. See 18 U.S.C. 3142 (i)(2).

265. Federal offenders may be sentenced directly to privately owned community corrections centres (CCCs), also known as "halfway houses". These facilities are usually owned and administered by private, non-profit service organizations (the Salvation Army, religious associations, etc.). Offenders serving part or all of their federal sentences in CCCs are still under the custody of the Attorney General and the BOP, although the daily management of these offenders is administered by the CCC professional staff. Private halfway houses are monitored regularly by BOP staff who provide training to CCC staff and who inspect the facilities to ensure that the CCC is in compliance with federal regulations regarding offender programme needs and facility safety requirements.

266. The operation of federal correctional institutions is directly supervised by the Director of the Bureau of Prisons, who reports to the Attorney General. When problems arise or allegations are raised regarding misconduct, the Attorney General may initiate an investigation. The Office of Inspector General within the Department of Justice conducts such investigations at the Attorney General's request. In addition, the BOP investigates allegations of staff misconduct internally through its Office of Internal Affairs. A separate branch of the Department of Justice may become involved if there is reason to believe the prisoners' rights are being violated. The legislative branch, the U.S. Congress, may initiate an investigation of the BOP's operations where problems are brought to their attention. Finally, federal courts may be called upon to resolve problems.

267. **State and local systems**. State prisons are normally operated by state corrections agencies. These agencies are normally located within the state's executive department, reporting to the governor or the state attorney general, though some are part of the health and human services or law enforcement division. State departments of corrections are structured in a fashion similar to the federal government. Persons are committed to the custody of the state department of corrections for service of a term of imprisonment. Where there are allegations of problems or improper behaviour, an investigation may be undertaken by the state's attorney general or by another branch of the government. An investigation may also be undertaken by federal authorities (such as the Civil Rights Division of the Department of Justice), particularly if the prisoner claims his constitutional rights have been violated. The matter also may be resolved in state or federal court.

268. County and local jails are supervised by the county or local government in which they are located. County jails, as well as county governments, are ultimately responsible to their respective state governments. In some large metropolitan areas, municipal or city governments may also exercise correctional authority, subject to state and federal law. Many states have systems of jail inspections to ensure that these local facilities are operated in conformity with state and local standards.

269. **Staff training**. All correctional staff in the United States are required to complete orientation programmes.

270. All Bureau of Prisons employees receive basic training during an intensive three-week "Introduction to Correctional Techniques" course at the Bureau of Prisons Staff Training Academy at the Federal Law Enforcement

Training Center in Glynco, Georgia. This training programme provides professional instruction in three categories: academics, firearms, and self-defence. Prior to working in correctional facilities, staff members must successfully complete this programme and also participate in "institutional familiarization" courses within the correctional institutions at which they will work. Bureau of Prisons staff members are required to participate in "annual refresher training" programmes conducted at the beginning of every year for the duration of their employment with the agency.

271. State and local criminal justice systems have independent systems of training corrections officers. Prison staff are generally trained by spending several weeks at a training academy. The majority of such training programmes consist of familiarizing new employees with department of corrections policies regarding inmate treatment, taking into account appropriate state and federal law. Such policies address issues such as proper search techniques, correspondence and telephone guidelines, use of force, etc. These policies dictate permissible and appropriate staff (and inmate) behaviour with respect to most aspects of prison life. Accordingly, it is essential that staff are aware of the substance of such rules.

272. In addition to subjects addressed by department of corrections regulations, subjects of instruction include race relations, mental health issues, introduction to correctional law, prisoner-staff relations, communication skills, self-defence and firearms training. Following the training at the academy, most correctional workers spend several weeks in on-the-job-training where they become more familiar with the workings of the particular institution to which they are assigned and gain some experience in dealing with inmates. Yearly refresher training is required of most correctional workers.

273. The American Corrections Association, a private, non-profit organization, has as its purpose to promote improvement in the management of American correctional agencies through the administration of a voluntary accreditation programme and the ongoing development of relevant, useful standards. The accreditation process began in 1978 and currently involves about 80 per cent of all state departments of corrections and youth services as active participants, as well as facilities operated by the District of Columbia and the U.S. Department of Justice.

274. ACA standards require that "a written body of policy and procedure establishes the institution's training and staff development programmes, including training requirements for all categories of personnel". They also require that all new full-time employees receive 40 hours of orientation training before undertaking their assignments. Orientation training includes at a minimum the following: orientation to the purpose, goals, policies, and procedures of the institution and parent agency; working conditions and regulations; employees' rights and responsibilities; and an overview of the correctional field. Depending on the employee(s) and the particular job requirements, orientation training may include preparatory instruction related to the particular job. ACA Standards, 1990. Facilities must provide specific training programmes for administrative staff, specialist employees,

professional workers, support staff, clerical workers, part-time and contract individuals. Training needs and programmes must be reviewed and updated annually.

275. Many correctional training and staff development programmes are supplemented by the resources of public and private agencies, local police academies, private industry, colleges, universities, and libraries. Outside guidance and assistance for the institution's training programme can take the form of materials, equipment, course development, and evaluation techniques. Training opportunities are also available for state and local agencies at the national level. The National Institute of Corrections, the National Academy of Corrections, the National Institute of Justice, the Federal Bureau of Investigation, large corporations, and various professional groups all provide managerial, specialized, and advanced training opportunities for state and local corrections officials in addition to the basic training provided in the institutions.

276. Complaints. The Department of Justice receives and acts on complaints sent directly from both federal and state prisoners. Such letters are received regularly both by the Civil Rights Division and by the Federal Bureau of Investigation (FBI). All letters from prisoners are carefully reviewed to determine if they state a basis for a criminal investigation. Those which complain about conditions of confinement are referred to the Civil Rights Division's Special Litigation Section to determine if any civil action may be warranted pursuant to the Civil Rights of Institutionalized Persons Act.

277. The Civil Rights Division's Criminal Section also receives referrals from the Federal Bureau of Prisons. When a federal prisoner complains to the federal prison about the conduct of a prison official - typically a correctional officer - and the substance of that complaint indicates a possible criminal violation, the Bureau of Prisons immediately transmits the complaint to the Civil Rights Division for review.

278. If a letter from a prisoner, or the prisoner's complaint forwarded by the Bureau of Prisons, indicates that a prosecutable civil rights offence may have occurred, the FBI conducts a preliminary investigation. Typically, these complaints will allege the use of excessive force by a prison guard. In its investigation the FBI will interview the victim and any witnesses, and will obtain any relevant written records, such as incident reports or medical records. The results of this investigation are analysed by an attorney in the Criminal Section to determine what facts can be proven and whether these facts indicate that a criminal civil rights violation has occurred. If so, the attorney may recommend that a grand jury investigation be instituted. The grand jury investigation may lead to indictment and criminal prosecution of the prison official.

279. Many complaints involve individual grievances, including alleged wrongful conviction of a criminal offence, problems involving parole, grievances against the convict's counsel, request for transfer to a different facility, and other requests for personal assistance. For the most part, the Department of Justice is without authority to address these individual problems, but other remedies may be available.

280. Other complaints allege systemic deficiencies, e.g. lack of adequate medical care, violence, abuse and neglect of a significant number of individuals, lack of adequate staff to afford necessary services and supervision, lack of safety for individuals confined, insufficient treatment or training for mentally disabled individuals, inadequate sanitation, and the like. Pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. section 1997e, the Attorney General has authority to investigate various public facilities where she believes that conditions are subjecting confined individuals to a pattern or practice of deprivations of their constitutional rights. Since the passage of the statute in 1980, some 150 institutions have been investigated.

281. **Prosecutions**. Abuses do sometimes occur in jails and prisons in the United States. The states can and do prosecute their abusive prison officials. In addition, the Department of Justice has conducted prosecutions in a variety of cases involving federal and state prison officials. The following are illustrative examples of such prosecutions:

(a) In 1990 three correction officers of the Adult Correctional Facility at Cranston, Rhode Island, were sentenced to prison terms ranging from six months to a year for beating an inmate who had been convicted of child molestation. Upon his arrival at the prison, the inmate was beaten about the head and kicked in the ribs by a group of guards;

(b) In 1991, five prison guards at Cross City Correction Institute in Florida were convicted and sentenced to terms ranging from nine months to nearly six years. The guards had roamed the prison shortly after a riot and beaten prisoners in retaliation. Some of the prisoners beaten had not even participated in the riot. Several of the prisoners suffered severe injuries, including one inmate who lost an eye when he was kicked in the face while down on his hands and knees;

(c) In 1993, the Chief Correctional Officer of the Washington County Jail in West Virginia was sentenced to 37 months' incarceration and ordered to pay $14,933 in restitution after he pleaded guilty to coercing women inmates into having sexual encounters with him. The defendant exchanged drugs and prison privileges for sex and threatened inmates that if they did not cooperate with him, they would be transferred or not released from jail.

282. Since October 1988, the Department of Justice has filed charges in approximately 126 cases of official misconduct. These cases involved approximately 180 police officers. About 15 of the cases involved officials violating the civil rights of a prisoner or person in jail; approximately 55 officials were involved in such cases.

283. **Segregation of the accused from the convicted**. A suspect detained pending trial is entitled to greater rights and privileges than convicted persons and may not be punished. To ensure these rights and privileges are provided, accused persons are, to the extent practicable, segregated from convicted persons. United States v. Lovett, 328 U.S. 303 (1946). Such separation is required by federal law, 18 U.S.C. section 3142, and many state laws contain similar provisions. Separation of federal detainees is accomplished by housing pretrial detainees in separate units within

Metropolitan Correctional or Detention Centres, or in local jails, or in federal correctional institutions. See 28 C.F.R. section 551.104. When consistent with the security and good order of the correctional facility, and where it appears to present no danger to the detainee, a pretrial detainee, at the detainee's request, may be intermingled with convicted prisoners in order to participate in programmes. Most state and county corrections policies require separation of individuals based upon their conviction status, whenever practicable. When possible, pretrial detainees are separated from convicted offenders. Due to overcrowding in most correctional systems, the separation of pretrial and convicted offenders is not always possible due to space constraints. Moreover, in the military justice system, segregation of the accused from the convicted cannot always be guaranteed in light of military exigencies.

284. U.S. understanding. Because of the above and related concerns, the United States included in its instrument of ratification the following statement of understanding:

> "The United States understands the reference to 'exceptional circumstances' in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons."

285. Treatment of juveniles. U.S. law, policy, and practice are generally in compliance with the Covenant's requirements regarding separate treatment of juveniles in the criminal justice system. In general, children deprived of their liberty in the U.S. are constitutionally entitled to treatment appropriate to their age and status. Courts have developed a substantial body of case law in this area, requiring, inter alia, that incarcerated children be accorded decent accommodations, education and support services. See e.g. Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972). Federal law requires that juvenile offenders be completely segregated from adult inmates. See 18 U.S.C. section 5039. Most state and local correctional facilities never place juvenile offenders with adult prisoners, regardless of overcrowded conditions. Separate facilities, or units within facilities, are often utilized to ensure that these groups remain apart. In the vast majority of jurisdictions, children who are deprived of their liberty are housed in facilities or homes devoted solely to juveniles. In those cases in which juveniles and adults are housed in the same facility, they are completely segregated. The only exception to this practice occurs when an older juvenile's case has been transferred to the adult criminal court and he or she is subsequently imprisoned as an adult.

286. U.S. reservation. None the less, close consideration of the Covenant's provisions in this regard indicated that it would be prudent to retain a measure of flexibility to address exceptional circumstances in which trial or incarceration of juveniles as adults might be appropriate, for example, prosecution of juveniles as adults based on their criminal histories or the especially serious nature of their offences, and incarceration of particularly dangerous juveniles as adults in order to protect other juveniles in custody. Moreover, there is no separate system for juveniles within the United States

armed services. Individuals are permitted to enlist in the military at age 17. They are subject to the Uniform Code of Military Justice as fully as other members of the military. Cadets of the service academies also are subject to the Code. Accordingly, the United States included the following reservation in its instrument of ratification:

> "[T]he policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18."

287. **Reform and rehabilitation**. While there is no right under the U.S. Constitution to rehabilitation, Coakley v. Murphy, 884 F.2d 1218 (9th Cir. 1989), all prison systems have as one of their goals the improvement of prisoners to facilitate their successful reintegration into society. For example, the Federal Bureau of Prisons' mission is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, and appropriately secure, and which provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. Moreover, Bureau of Prisons regulations require virtually all BOP institutions to provide a range of academic, occupational, and leisure-time activities to allow inmates to improve their knowledge and skills. 28 C.F.R. section 544.80-544.83.

288. While the extent of educational, vocational, and treatment programmes varies among prison systems, such programmes are an integral part of every correctional institution. In nearly all prison systems able-bodied sentenced prisoners are required to work, although exceptions are made for inmates who are enrolled in educational and vocational training programmes. Pretrial detainees, persons committed for mental health studies, material witnesses and other non-convicted detainees may not be forced to work other than to maintain their personal living space. In many cases these prisoners agree to work; many do so to alleviate boredom and to earn spending money or to assist their families. While not required by the Constitution, prisoners are usually compensated for their services, though the pay is modest. Correctional institutions employ prisoners in industry (manufacturing furniture and many other items), data processing, and maintenance and repair. Inmates with a low security classification may be released during the day to work on community projects such as maintaining state and federal parks and public roads. Some federal correctional institutions are located on the grounds of military bases and the inmates provide support services to the military such as lawn maintenance. Some correctional institutions allow private businesses to employ prisoners, but such arrangements are complicated as to appropriate compensation for the prisoners. See Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Cir. 1991).

289. In addition to providing necessary services to the correctional institution, jobs enable the inmates to earn money to help support their families, and to receive training for employment after release. Many prisons

offer vocational training programmes such as auto mechanics and metal work that allow prisoners to become certified to pursue a trade upon release.

290. Some prisoners incarcerated in correctional institutions operated by the Federal Bureau of Prisons have the opportunity to work in Federal Prison Industries (tradename UNICOR). UNICOR operates factories, printing plants, and data-processing centres to produce a vast array of goods and services sold to components of the federal government. Inmates who work in UNICOR earn up to $1.40 per hour, substantially more than inmates employed in institution maintenance positions. Moreover, they learn skills applicable to many private sector jobs.

291. All prisons have education programmes and inmates are strongly encouraged to participate. Federal law requires the Bureau of Prisons to operate a mandatory functional literacy programme for inmates to ensure that inmates possess reading and mathematical skills equivalent to the eighth grade level. Further, non-English-speaking federal inmates must participate in an English as a second language programme until they also meet the literacy requirements. 18 U.S.C. section 3624(f). In addition to basic educational programmes including the preparation for the Federal Education Development certificate, many prisons offer university courses by correspondence or by bringing college instructors to the prison. Staff encourage inmates to enrol in such programmes, and they assist inmates in exploring sources of funding. See e.g. 28 C.F.R. section 544.20-21.

292. Federal prisoners are also given the opportunity to participate in social education programmes designed to "improve their interpersonal relationships, communication, self-motivation, realistic goal setting, and positive self-concept". 28 C.F.R. section 544.90.

293. A significant number of prisoners suffer from chemical and alcohol dependency; specifically, 47 per cent of federal inmates manifest such problems. Accordingly, correctional institutions have drug and alcohol treatment programmes designed to help the prisoners overcome their dependencies. Some programmes offer inmates individual or group counselling sessions, and other, more intensive programmes, involve full-time treatment. These programmes extend into an intensive community supervision phase to help offenders remain drug-free upon release.

294. In furtherance of the programmes described above and in order to protect the safety of prisoners and staff alike, prison administrators have found it useful to classify prisoners and house prisoners with others who share some important characteristics. For example, it would be dangerous to house young, inexperienced, non-violent offenders with older men who have spent a great deal of their lives in prison for the commission of violent, predatory crimes. Accordingly, prisoners are classified at a particular security level prior to their admission into a correctional institution. Classification decisions are based on age, prior criminal history, offence giving rise to the imprisonment, history of escape or violence, history of prison misconduct, as well as the prisoner's needs regarding treatment, education, and release planning.

295. The military justice system. The Department of Defense has established uniform policies among the military services in the treatment of prisoners,

the operation and administration of correctional facilities and programmes and the consideration of prisoners for return to duty, clemency, or parole. DoD Directive (DoDD) 1325.4, 19 May 1988. Consistent with this policy, members of the military deprived of their liberty because they have committed criminal offences are treated humanely, with respect for their dignity and in a structured behavioural treatment system the fundamental goals of which are reformation and rehabilitation.

296. The objective of the confinement and correction programme in the military is to provide quality confinement and rehabilitative services to commanders. Use of positive measures and rehabilitation is intended to prepare the maximum number of prisoners for return to military duty with improved attitudes and behaviour, and to return those judged unfit for further military duty to the civilian community as more productive and responsible citizens. The goals of the confinement and correction programme are to help individuals solve their problems, correct their behaviour, and improve their attitudes toward self, military, and society.

297. On confinement, the confinement officer or appointee determines a custody grade for the prisoner. As a rule, medium is the initial custody grade unless there is a specific reason to assign the prisoners to maximum or minimum custody. Prisoners are assigned to maximum custody if they are a danger to themselves or others, present a high escape risk, or are sentenced to death. Maximum custody prisoners are confined separately in a single cell. Medium custody prisoners require continuous supervision. They are eligible for normal work assignments outside the confinement or correction facility. Minimum custody prisoners require little supervision due to trustworthiness, attitude, and dependability. With approval from the installation commander, minimum custody prisoners may go to and from work or appointments without escort.

298. Military prisoners are employed in maintenance and support activities that provide useful and constructive work. Work assignments must be consistent with the prisoner's grade, custody level, physical and mental condition, behaviour, sentence status, and previous training. Assignments should contribute toward the prisoner's correctional treatment and the needs of the confinement or correction facility. Prisoners not in training for return to duty will normally be assigned to work projects in preparation for return to civilian life.

299. **U.S. understanding**. While acknowledging that reformation and social reform of prisoners are fundamental objectives, the United States included the following interpretive statement in its instrument of ratification:

> "The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence and incapacitation as additional legitimate purposes for a penitentiary system."

Article 11 - Freedom from imprisonment for breach of contractual obligation

300. In the United States, imprisonment is never a sanction for the inability to fulfil a private contractual obligation. Contract law generally provides

remedies for the promisee rather than punishment for the promisor. Breach of contract is a civil matter and imprisonment is never a civil remedy. The historical remedies for failure to fulfil a contractual obligation include assessment of damages to be paid by the non-fulfilling party to compensate the other party to the contract for his losses. Where damages cannot remedy the situation, the court can enter an order directing the party to specifically perform. The purpose of remedies in contract law is to correct the problem or ameliorate the adverse consequences, not to punish the non-performing party.

Article 12 - Freedom of movement

301. In the United States, the right to travel - both domestically and internationally - is constitutionally protected. The U.S. Supreme Court has held that it is "a part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment". Zemel v. Rusk, 381 U.S. 1 (1965). As a consequence, governmental actions affecting travel are subject to the mechanisms for judicial review of constitutional questions described elsewhere in this report. Moreover, the United States Supreme Court has emphasized that it "will construe narrowly all delegated powers that curtail or dilute citizens' ability to travel". Kent v. Dulles, 357 U.S. 116, 129 (1958).

302. Within the United States, there are no restrictions on movement or change of residence from state to state or city to city, save in exceptional situations, in which such restrictions would be warranted under paragraph 3 of this article (restriction of movement for persons under investigation, subpoena, or arrest warrant in a criminal matter, or restriction as a condition of probation or parole), or by a state of emergency under article 4 or to protect national security under paragraph 3 of article 12. Nor is there a registration requirement for citizens. Under the Alien Registration Act, 8 U.S.C. section 1302, non-resident aliens over the age of 14 who remain in the United States over 30 days, and who were not registered and fingerprinted in their visa application process, must register and be fingerprinted. This registration requirement does not, however, restrict movement.

303. **Citizen travel: passports**. Section 215(b) of the Immigration and Nationality Act, 8 U.S.C. section 1185(b), establishes a general requirement that U.S. citizens use a passport to depart from or enter the United States. No civil or criminal penalty is provided, however, for failure to comply with this statute. A passport is not required for travel within the United States or between the United States and any part of either North or South America, except Cuba. Exceptions to the general rule requiring passports for foreign travel are also made for U.S. citizens travelling in their official capacity as merchant mariners or air crewmen, or on active military duty. An exception also exists for citizens under 21 whose parents are employees of a foreign Government, and who either hold or are included in a foreign passport. There are also limited circumstances in which a citizen can obtain a special pass from a consular officer or specific authorization from the Secretary of State to have the passport requirement waived.

304. **Mandatory denial**. Passports are issued to applicants as a matter of course in all but a few rare situations. Except for direct return to the U.S., the law provides that a passport shall not be issued to an applicant

subject to a federal arrest warrant or subpoena for any matter involving a felony. Furthermore, a passport shall not be issued where the applicant is subject to a court order or condition of parole or probation which forbids departure from the U.S. Passports will also be refused if the applicant has not repaid loans received from the United States for certain expenses incurred while the applicant was a prisoner abroad. Nor will a passport be issued if the applicant is under imprisonment or supervised release for any conviction, at either the state or federal level, for a felony involving a controlled substance.

305. In any case, including for direct return to the United States, a passport may be refused where the applicant has not repaid a loan received from the United States to effectuate his return from a foreign country, where the applicant has been declared incompetent, or where a minor applicant does not have the necessary consent of legal guardians. Moreover, a passport may be refused if the Secretary of State determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States. Finally, a passport may be refused when the applicant is subject to imprisonment or supervised release for a misdemeanour drug conviction, other than a first offence for possession, if the individual used a U.S. passport or otherwise crossed an international border in committing the offence.

306. A passport may be revoked, restricted, or limited where the national would not be entitled to a passport as described above, or where the passport was obtained by fraud, or fraudulently altered or misused. Unless specifically validated therefore, a U.S. passport shall cease to be valid for travel into or through any country or area at war with the United States. U.S. passports may also be invalidated for travel through areas in which armed hostilities are in progress, or where there is imminent danger to the public health or physical safety of U.S. travellers. Such determinations are made by the Secretary of State and are published in the Federal Register.

307. When a passport has been denied or revoked, the person affected receives notice in writing, and may go through a review process. The adversely affected person has 60 days to require the Department of State or the appropriate Foreign Service post to establish the basis for its action in a proceeding before a hearing officer. At the private hearing, the adversely affected person may appear and testify, present witnesses and other evidence, and make arguments. If the person wishes, he or she may be represented or assisted by an attorney. The adversely affected person is entitled to be informed of all evidence before the hearing officer and of the source of such evidence, and may confront and cross-examine adverse witnesses. In the event of an adverse decision, the adversely affected person has 60 days to appeal to the Board of Appellate Review of the Department of State. In either the original complaint and the subsequent appeal, if the adversely affected person fails to take advantage of the 60-day window, the matter is closed and not subject to further administrative review.

308. U.S. law provides generally that "a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of

United States travellers". 22 U.S.C. section 211a. Controls are currently in effect under this statute for Lebanon, the Libyan Arab Jamahiriya, and Iraq; passports are validated for travel to these countries on a case-by-case basis. Apart from the above restrictions, there does not exist any legal authority that would permit the United States Government directly to prevent the peacetime travel of U.S. citizens abroad, except pursuant to United Nations Security Council mandatory sanctions. In extraordinary circumstances, limitations may be imposed, e.g. on travel-related transactions with a foreign government or country, on the grounds of national or international security (e.g. pursuant to United Nations Security Council sanctions, the International Emergency Economic Powers Act, 50 U.S.C. section 1701, or the Trading with the Enemy Act, 50 U.S.C. App. 5(b), Regan v. Wald, 468 U.S. 222 (1984)) which, while not regulating travel directly, may have the indirect effect of limiting travel. Recent legislation has prohibited the imposition of new controls on travel-related transactions under IEEPA after 30 April 1994. This does not affect existing controls or new controls mandated by the United Nations Security Council.

309. A citizen of the United States who can prove his or her citizenship cannot be deprived of the right to return to the United States under any circumstances. However, if a person comes to the United States and has no acceptable documentation relating to citizenship or nationality, such as a passport or birth certificate, then the immigration officer at the port of entry may detain that person and conduct an investigation to determine citizenship. 8 C.F.R. 235.1.

310. Non-U.S. citizens are free to leave the United States and to return to their country of origin, or to travel to third countries, except in rare instances. Departure may be denied, for example, to aliens who are fugitives from justice on account of an offence punishable in the United States. If departure is restricted pursuant to a departure control order, the alien will be given written notice of that restriction, and will be entitled to an administrative hearing. See generally 8 C.F.R. Part 215.

311. As noted above, travel within the United States is generally unregulated and unrestricted. In exceptional circumstances, however, aliens are subject to certain conditions regarding their travel. In most cases, such persons are diplomatic personnel or governmental representatives to international organizations. Travel of diplomatic personnel may be restricted on the basis of reciprocity where travel of U.S. personnel is restricted in the foreign state; travel of aliens in either category may be restricted where they are considered to present a security risk to the United States. Rarely, other individuals who might otherwise be denied entry to the United States are permitted entry subject to restrictive travel conditions on national security grounds, e.g. where the individual has a past association with terrorist activity.

Article 13 - Expulsion of aliens

312. The United States has a strong tradition of supporting immigration and has adopted immigration policies reflective of the view that immigrants make invaluable contributions to the fabric of American society. At present, the United States provides annually for the legal immigration of over

700,000 aliens each year, with special preferences granted for family reunification and employment skills purposes. In addition, the United States grants admission to some 120,000 refugees from abroad annually, and accords political asylum to many others within the United States. Notwithstanding these large programmes for legal immigration to the United States, illegal immigration to the United States continues in substantial numbers. The total number of aliens illegally in the United States is currently estimated to be over 3 million. Due to the ease of travel and relative lack of residence controls within the United States, as well as the extensive procedural guarantees accompanying deportation, aliens who enter the continental United States illegally, or who stay on illegally after an initial lawful entry, are often able to remain for many years.

313. Aliens who have entered the United States, whether legally or illegally, may be expelled only pursuant to deportation proceedings, as described below. (Different procedures apply to diplomatic representatives, who may be declared persona non grata.) The legal protection for such persons includes the extensive procedural safeguards provided by the Immigration and Nationality Act (INA), U.S.C. section 1101 et seq., and rests fundamentally on the constitutional rights of due process afforded to all. As the Supreme Court has stated:

> "Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Shaughnessy v. United States, 206 U.S. 206, 212 (1953).
>
> "Whatever his status under the immigration laws, an alien is surely a 'person' [for purposes of certain constitutional guarantees] in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210 (1981).

314. The term "entry" is generally defined under INA section 101(a)(13) as "any coming of an alien into the United States from a foreign port or place". Aliens within the United States who were inspected and admitted as well as those who evaded inspection and came into the United States illegally are considered to have effected an "entry". Persons who attempt illegal entry but are detected at the border prior to entry are occasionally allowed into the United States for further processing of their entry claims (in lieu of return to their home country or detention at the border), or under the Attorney General's discretionary parole authority. Such excludable aliens, whose presence in the United States results solely from the limited, conditional permission of the United States Government, are not considered to have entered the United States for immigration purposes. They generally are subject to exclusion proceedings, as described below, which provide some due process protections, although not as extensive as those provided in deportation proceedings.

Deportation

315. Aliens who have entered the United States and who violate U.S. immigration laws are subject to deportation proceedings. Grounds for deportation include: (i) excludability at time of entry or adjustment of status; (ii) entry without inspection; (iii) alien smuggling; (iv) marriage fraud; (v) criminal offences; (vi) falsification of documents; (vii) security grounds; (viii) public charge grounds.

316. Deportation hearing. In general, a proceeding to determine the deportability of an alien in the United States is initiated with the filing of an Order to Show Cause (OSC), which describes the grounds for deportation, with the Office of the Immigration Judge. 8 C.F.R. sections 242.1(a), 3.14(a). INS may either take the alien into custody under the authority of a warrant, or release the alien on bond or on conditional parole. INA section 242 (a)(1); 8 C.F.R. section 242.2 (c)(1), (2).

317. Generally, an alien "is not and should not be detained or required to post bond except on a finding that he is a threat to the national security ... or that he is a poor bail risk". Matter of Patel, 15 I&N Dec. 666 (BIA 1976). The Attorney General is, however, obligated to take into custody any alien convicted of an aggravated felony, but may release the alien, if the alien demonstrates that the alien "is not a threat to the community and that the alien is likely to appear before any scheduled hearings". INA section 242(a)(2)(B); 8 C.F.R. section 3.19(h). Custody and bond determinations made by the Immigration and Naturalization Service (INS) may be reviewed by an immigration judge and may be appealed to the Board of Immigration Appeals (BIA). An alien's release on bond or parole may be revoked at any time in the discretion of the Attorney General. INA section 242(a).

318. Deportation hearings are open to the public, except that the immigration judge may, for the purpose of protecting witnesses, parties, or the public interest, limit attendance or hold a closed hearing in any specific case. 8 C.F.R. sections 242.16(a), 3.27(b); 3.27(c). Furthermore, an applicant for asylum or withholding of deportation may expressly request that the evidentiary hearing be closed to the public. 8 C.F.R. section 242.17(c)(4)(i).

319. During deportation proceedings, the immigration judge has the authority to determine deportability, to grant discretionary relief, and to determine the country to which an alien's deportation will be directed. The immigration judge must also: (i) advise the alien of the alien's right to representation, at no expense to the government, by qualified counsel of his choice; (ii) advise the alien of the availability of local free legal services programmes; (iii) ascertain that the alien has received a list of such programmes and a copy of INS Form I-618, Written Notice of Appeal Rights; (iv) advise the alien that the alien will have a reasonable opportunity to examine and object to adverse evidence, to present evidence, and to cross-examine witnesses presented by the government; (v) place the alien under oath; (vi) read the factual allegations and the charges in the order to show cause to the alien and explain them in non-technical language, and enter the order to show cause as an exhibit in the record. 8 C.F.R. section 242.16(a).

320. The INA mandates that the "alien shall have a reasonable opportunity to be present" at the deportation proceeding. INA section 242(b). The BIA has held that aliens "must be given a reasonable opportunity to present evidence on their own behalf, including their testimony". Matter of Tomas, 19 I&N Dec. 464, 465 (BIA 1987). The BIA has further noted that in most cases, "all that need be translated are the immigration judge's statements to the alien, the examination of the alien by his counsel, the attorney for the Service, and the immigration judge, and the alien's responses to their questions". Matter of Exilus, 18 I&N 276, 281 (BIA 1982). However, "the immigration judge may determine ... that the alien's understanding of other dialogue is essential to his ability to assist in the presentation of his case". Id.

321. In a proceeding before an immigration judge "in which the [alien] fails to appear, the immigration judge shall conduct an in absentia hearing if the immigration judge is satisfied that notice of the time and place of the proceeding was provided to the [alien] at a prior hearing or by written notice to the [alien] or to [the alien's] counsel of record, if any, at the most recent address contained in the Record of Proceeding". 8 C.F.R. section 3.26.

322. If the alien concedes deportability and the alien has not applied for discretionary relief other than voluntary departure (discussed below), the immigration judge may enter a summary decision ordering deportation or granting voluntary departure with an alternate order of deportation. 8 C.F.R. section 242.18(b). The immigration judge may not accept an admission of deportability "from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which [an alien] is an inmate or patient". 8 C.F.R. section 242.16(b).

323. In cases where deportability is at issue and/or where the alien has applied for discretionary relief, the immigration judge receives evidence on the issues. The government must establish an alien's deportability by clear, convincing, and unequivocal evidence and must establish that the person is an alien. 8 C.F.R. section 242.14(a). If deportability is based on an entry violation, such as entry without inspection, however, after the INS establishes identity and alienage of the person, the burden shifts to the alien to show the time, place, and manner of his entry into the United States. If this burden of proof "is not sustained, such person shall be presumed to be in the United States in violation of law". INA section 291.

324. **Relief from deportation**. The immigration judge determines applications under INA sections 208(a) (asylum) (discussed under U.S. Asylum and Refugee Policy, below), 212 (waivers of excludability), 243(h) (withholding of deportation) (also discussed below), 244(a) (suspension of deportation), 244(e) (voluntary departure), 245(a) (adjustment of status), and 249 (registry).

(a) Waivers. Waivers are available for some of the grounds of deportation;

(b) Suspensions of deportation. Under INA section 244(a), the Attorney General may "suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien ... who

applies for suspension of deportation" and (i) is deportable; (ii) subject to certain exceptions, has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application; (iii) proves that during all of such period he was and is a person of good moral character; and (iv) is a person whose deportation would in the opinion of the Attorney General result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. INA section 244(a)(1);

(c) Voluntary departure. The Attorney General may permit an alien to "depart voluntarily from the United States at his own expense in lieu of deportation" if such alien (i) is not deportable for criminal offences, falsification of documents or on security grounds; (ii) is not an aggravated felon; and (iii) establishes "to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure". INA section 244(e)(1);

(d) Registry. INA section 249 generally provides that the Attorney General may create a record if lawful admission for permanent residence for an alien, as of the date of the approval of his application, if (i) such alien is not excludable as participant in Nazi persecutions or genocide and not excludable under INA section 212(a) "as it relates to criminals, procurers, and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens"; and (ii) the alien establishes that he entered the United States prior to 1 January 1972; has had residence in the United States continuously since such entry; is a person of good moral character; and is not ineligible for citizenship. INA section 249; see also 8 C.F.R. section 249.1 (discussing waivers of inadmissibility for certain exclusion grounds in conjunction with registry applications).

325. Decisions and appeals. A decision of an immigration judge in a deportation hearing may be written or oral. Appeal from the decision lies with the BIA. 8 C.F.R. section 242.21. A final order of deportation may be reviewed by federal courts, but will not be reviewed "if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order". INA section 106 (c). The immigration judge may upon the judge's own motion, or upon motion of the trial attorney, or the alien, reopen any case which the judge decided, "unless jurisdiction in the case is vested in the Board of Immigration Appeals". 8 C.F.R. section 242.22. A motion to reopen "will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing". Id.

Exclusion

326. An alien has the burden of satisfying the INS officer at the border point of entry that the alien is entitled to enter the United States and not subject to exclusion. If the officer concludes the alien is not clearly entitled to enter, the officer must detain the alien for further inspection. INA section 235(b). The alien may be released on bond or parole; the standards for release are essentially the same as they are in deportation proceedings.

327. Exclusion proceedings are held before immigration judges. See 8 C.F.R. section 236. They are not public, unless the alien requests that they be. 8 C.F.R. section 236.2(a). Unlike deportation cases, the authority to make detention decisions rests with the INS, rather than the immigration judge.

328. The immigration judge must inform the alien of the nature and purpose of the hearing; advise the alien that the alien has a statutory right to have an attorney at no cost to the government, and of the availability of free legal services programmes; ascertain that the applicant has received a list of such programmes; request the alien to determine then and there whether the alien desires representation; and advise the alien that the alien will have a reasonable opportunity to present evidence, to examine and object to adverse evidence, and to cross-examine witnesses presented by the government.

329. Except for aliens previously admitted to the United States for lawful permanent residence, aliens have the burden of proving their admissibility in exclusion proceedings. The immigration judge can grant various forms of relief, including waivers, adjustment of status under certain conditions, and political asylum and withholding of exclusion. Suspension of deportation and voluntary departure are not available.

330. The immigration judge's decision may be oral or written. The alien may appeal to the BIA. 8 C.F.R. sections 3.1(h), 236.7. Attorney General review of the BIA's decision is available only upon request by the INS Commissioner, the BIA Chairman, or a majority of the BIA, or in the discretion of the Attorney General.

331. Following a final determination of exclusion, an alien may surrender himself to the custody of the INS, or may be notified to surrender to custody. An alien taken into custody either upon notice to surrender or by arrest may not be deported less than 72 hours thereafter unless the alien consents in writing. 8 C.F.R. section 237.2.

332. An alien detained pending or during exclusion proceedings may seek further review in federal court under a writ of habeas corpus.

United States refugee and asylum policy

333. The refugee and asylum policy of the United States, set forth primarily in the Refugee Act of 1980 and the Immigration and Nationality Act (the INA), was created in accordance with the strong, historical commitment of the United States to the protection of refugees and in compliance with the 1967 United Nations Protocol relating to the Status of Refugees. The Protocol, to which the United States has acceded, adopted the operative provisions of the 1951 United Nations Convention relating to the Status of Refugees.

334. Under the INA, persons within the United States may seek refugee protection through a grant of asylum or withholding of deportation. The standard for such determinations is that provided in the Protocol, defining a refugee as: "any person who is outside of any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself

of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion". INA section 101(a)(42)(A); 8 U.S.C. section 1101(a)(42)(A). Refugee status is not available to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion", or for aliens who have been convicted of an aggravated felony. INA sections 101(a)(42)(B) and 208(d); 8 U.S.C. sections 1101(a)(42)(B) and 1158(d).

335. At present, there are some 300,000 asylum claims pending in various stages of adjudication; over 100,000 new claims were filed in fiscal year 1992. A related form of protection, temporary protected status, is available to persons already within the United States when the Attorney General determines that certain extreme and temporary conditions in their country of nationality (such as ongoing armed conflict or an environmental disaster) generally do not permit the United States to return them to that country in safety.

336. In addition, the United States maintains a substantial programme for providing assistance to refugees overseas. The United States overseas refugee admissions programme, which also uses the Protocol definition of refugee, provides for the admission and resettlement in the United States of over 120,000 refugees of special humanitarian concern to the United States each year from throughout the world. In addition, the United States provides on-site assistance, primarily through relevant international organizations such as the United Nations High Commissioner for Refugees, the International Committee of the Red Cross, and the International Organization for Migration, in the amount of over $300 million each year, not only to "Protocol refugees" but also to others who are suffering from the disruptive effects of conflict or other forms of dislocation. In the last three years alone, the United States has contributed over $1 billion in assistance to refugees throughout the world.

337. **Refugee admissions**. The INA provides for the admission of refugees outside the United States. Each year the President, after appropriate consultation with Congress, determines an authorized admission level for refugees. For example, the admission ceiling for refugees in 1994 was 121,000. This annual ceiling represents the maximum number of refugees allowed to enter the United States each year, allocated by world geographical region. INA section 207(a). The President may accommodate an emergency refugee situation by increasing the refugee admissions ceiling for a 12-month period. INA section 207(b); 8 U.S.C. section 1157(b).

338. Persons applying in overseas offices for refugee protection in the United States must satisfy four criteria. They must: (i) fall within the definition of a refugee set forth in the INA; (ii) be among the types of refugees determined to be of special humanitarian concern to the United States; (iii) be admissible under the Immigration and Nationality Act; and (iv) not be firmly resettled in any foreign country.

339. The refugee application process originates either at a United States embassy or at a designated consular office, if distance makes direct filing at

an embassy impracticable. 8 C.F.R. section 207.1(a). Interviews are then conducted by employees of the Immigration and Naturalization Service. There exists no formal procedure for either administrative appeal or judicial review of adverse decisions. The applicant has the burden of showing entitlement to refugee status. 8 C.F.R. section 208.8(d).

340. **Asylum**. Asylum applications may be submitted by persons who are physically present in the United States. Asylum may be granted without regard to the applicant's immigration status or country of origin. There are two paths for an alien present in the United States seeking asylum. First, the alien may come forward to the INS to apply "affirmatively". Second, the alien may seek asylum as a defence to exclusion or deportation proceedings, even after a denial of asylum through the affirmative process. Grants of asylum are within the discretion of the Attorney General under either process, but the affirmative asylum process is executed under the auspices of the INS, while the exclusion and deportation procedures fall within the jurisdiction of the Executive Office for Immigration Review within the Department of Justice.

341. **Affirmative asylum**. Affirmative asylum claims are heard and decided by a corps of INS asylum officers located in seven regional offices. The Asylum Officer conducts an interview with the applicant "in a non-adversarial manner ... to elicit all relevant and useful information bearing on the applicant's eligibility". 8 C.F.R. section 208.9(b). The applicant may have counsel present at the interview and may submit the affidavits of witnesses. In addition, the applicant may supplement the record within 30 days of the interview. 8 C.F.R. section 208.9.

342. Upon completion of the interview, the asylum officer must forward a copy of the asylum application to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) (recently renamed the Bureau of Democracy Rights and Labor) of the Department of State. The BHRHA may comment on the application within 45 days. The asylum officer may make a final decision if no response from the BHRHA arrives within 60 days. 8 C.F.R. section 208.11.

343. The asylum officer's decision must be in writing and, if asylum is denied, the decision must include a credibility assessment. 8 C.F.R. section 208.17. The alien has the right to specific reasons for denial and the right to both factually and legally rebut the denial. 8 C.F.R. sections 103.3(a) and 103.2(b)(2). The decision of the asylum officer is reviewed by the INS's Office of Refugees, Asylum, and Parole (CORAP), but the applicant has no right to appeal. 8 C.F.R. section 208.18(a).

344. Asylum claims must be denied when: (i) the alien has been convicted of a particularly serious crime in the United States and constitutes a danger to the community; (ii) the alien has been firmly resettled in a third country; or (iii) there are reasonable grounds for regarding the alien as a threat to the security of the United States. 8 C.F.R. section 208.14(c). In addition, asylum officers may use discretion in asylum denials.

345. Asylum officers also have limited power to revoke asylum and relief under the "withholding of deportation" provision of the INA (section 243(h)). This power may be exercised when: (i) the alien no longer has a well-founded fear of persecution or is no longer entitled to relief under section 243(h) because

of changed country conditions; (ii) there existed fraud in the application such that the alien was not eligible for asylum at the time it was granted; or (iii) the alien has committed any act that would have been grounds for denial. 8 C.F.R. section 208.24(a)(b).

346. Once an affirmative asylum application is denied, the asylum officer is empowered, if appropriate, to initiate the alien's exclusion or deportation proceedings.

347. Asylum and withholding of exclusion/deportation in exclusion or deportation proceedings. If an alien has been served with an Order to Show Cause to appear at a deportation hearing or a notice to appear at an exclusion hearing, he must appear before an immigration judge, with whom he may file an asylum application. The filing of an asylum application is also considered a request for withholding of deportation or exclusion under INA section 243(h).

348. Relief under INA section 243(h) differs from a request for asylum in three ways. First, section 243(h) provides relief from deportation or exclusion to a specific country where the applicant's "life or freedom would be threatened", while asylum protects the alien from deportation generally and only requires a well-founded fear of persecution. Second, relief under section 243(h) cannot result in permanent residence, while asylees are eligible for permanent residence after one year. Third, relief under section 243(h) is mandatory while asylum is a discretionary grant.

349. An immigration judge must consider a section 243(h) claim "de novo regardless of whether or not a previous application was filed and adjudicated by an Asylum Officer". 8 C.F.R. section 208.2(b). Like an asylum officer, the Immigration Judge must request an advisory opinion from the BHRHA and wait 60 days before rendering a final decision.

350. The alien will be denied section 243(h) relief and will remain subject to exclusion or deportation if the alien: (i) engaged in persecution of others; (ii) has been convicted of a particularly serious crime that constitutes a danger to the community of the United States; (iii) has committed a serious non-political crime outside of the United States; or (iv) may represent a danger to the security of the United States. INA section 243(h)(2).

351. Denial of asylum and withholding of deportation by an Immigration Judge can result in a final order of deportation or exclusion. The alien may appeal to the Board of Immigration Appeals within ten days of the Immigration Judge's order. Appeal to federal courts is possible within ninety days of the Board's decision. INA section 106(a)(1); 8 U.S.C. section 1105(a)(1).

352. Parole under INA section 212(d)(5)(B). A refugee may be paroled into the United States by the Attorney General only if there exist "compelling reasons in the public interest with respect to that particular alien" to parole rather than admit the person as a refugee under INA section 207. INA section 212(d)(5)(B). Parole allows an alien to remain in the United States temporarily until a final status decision is made. Parole is not equivalent to an "admission", and thus leaves the alien subject to exclusion.

353. The Attorney General has created a "special interest parole" process "on an exceptional basis only for an unspecified but limited period of time" pursuant to the Lautenberg Amendment of the Foreign Operations Appropriations Act. Pub. L. No. 101-167. Under this provision, certain persons from Cambodia, the Lao People's Democratic Republic, Viet Nam, and the former Soviet Union (specifically Jews, Evangelical Christians, Ukrainian Catholics, and Ukrainian Orthodox Christians) who were inspected and paroled into the United States between 15 August 1988 and 30 September 1994 after being denied refugee status are eligible for adjustment of status.

354. **Temporary protected status**. Under INA section 244A, the Attorney General has the authority to grant temporary protected status to aliens in the United States, temporarily allowing foreign nationals to live and work in the United States without fear of being sent back to unstable or dangerous conditions. The United States thus may become, at the Attorney General's discretion, a temporary safe haven for foreign nationals already in the country if one of three conditions exist: (i) there is an ongoing conflict within the state which would pose a serious threat to the personal safety of returned nationals; (ii) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial but temporary disruption of living conditions; the state is temporarily unable to accept the return of nationals; and the state officially asks the Attorney General for a designation of temporary protected status; or (iii) there exist extraordinary and temporary conditions in the state that prevent nationals from returning in safety, as long as the grant of temporary protected status is not contrary to the national interest of the United States. INA section 244A(b)(1). Designation of temporary protected status may last for 6 to 18 months, with the possibility of extension.

355. An alien is ineligible for temporary protected status if he has been convicted of at least one felony or two or more misdemeanours. 8 C.F.R. section 240.4. Ineligibility is also based upon the grounds for denial of relief under INA section 243(h)(2), as stated above. Temporary protected status may be terminated if: (i) the Attorney General finds that the alien was not eligible for such status; (ii) the alien was not continuously physically present, except for brief, casual, and innocent departures or travel with advance permission; (iii) the alien failed to register annually; or (iv) the Attorney General terminates the programme. INA section 244A(c)(3).

356. An alien granted temporary protected status cannot be deported during the designated period and shall be granted employment authorization. The alien may also travel abroad with advance permission. Temporary protected status also allows the alien to adjust or change status.

357. At present, nationals from four states are eligible for temporary protected status: Bosnia-Herzegovina, until August 1994; Liberia, until March 1995; Somalia, until September 1994; and Rwanda, until June 1995. Nationals of El Salvador are eligible for a comparable form of temporary protection through December 1994.

358. **Rights of refugees and asylees**. Certain benefits are available to an alien applying for asylum. First, as long as the asylum claim appears

non-frivolous, the applicant may be granted employment authorization while the asylum application is pending. Second, the applicant may be granted advance parole to travel abroad to a third country for humanitarian reasons.

359. In April 1992, the INS created a "pre-screening" procedure to identify genuine asylum seekers whose parole from detention might be appropriate while their asylum claims are pending. Specially trained asylum pre-screening officers interview applicants in detention and evaluate asylum claims. If the claimant is deemed to have a "credible fear of persecution", then the alien may be released pending the asylum claim. The alien must, however, agree to check in periodically with the INS and appear at all relevant hearings.

360. The immediate family (spouse and children) of the person granted admission as a refugee or political asylum can accompany or follow such person without having to apply for protection independently. INA section 207(c)(2) and section 208(c).

361. Finally, one who entered the United States as a refugee is eligible for permanent resident status after one year of continuous physical presence in the United States. The number of refugees adjusting to permanent resident status is not subject to the annual limitation on immigrants into the United States. INA section 209. An asylee may also apply for permanent resident status after being continuously present in the United States for at least one year after being granted asylum. There are 10,000 visas set aside each year for asylees applying for residency.

Article 14 - Right to fair trial

362. The court systems in the United States grant both citizens and nationals of other countries the fair trial rights embodied in article 14 of the Covenant. The principles and practices of the justice system in the federal government, in the 50 states, and in the various territories and dependencies trace their roots to the federal Bill of Rights adopted two centuries ago and outlined in more detail in Part I of this report. The federal and state constitutions and statutory law provide for fair and public hearings. An independent judiciary, as well as an independent and active bar, are dedicated to the ideal and reality of fair trials and elaborate appellate procedures.

363. While not perfect, the American court systems do not remain static but constantly adapt to evolving notions of fairness and due process. Over the past 40 years, for example, problems of racism in jury selection and discrimination in the administration of justice were addressed head on. Constitutional rights of defendants were expanded markedly in several controversial rulings by the Supreme Court of the United States.

364. As the Republic enters its third century, the changing nature of crime will no doubt lead to further changes in the administration of justice. However, our federal and state systems are all bound by the mandatory and minimum guarantees of the federal Constitution. The Constitution is the base beneath which no state or federal court may depart, though greater protections than the minimum can be found in various state or federal laws.

Fair and public hearing

365. Criminal cases. The Due Process clause of the Fifth Amendment to the U.S. Constitution provides that, "No person shall ... be deprived of life, liberty, or property, without due process of law". That provision, applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to a fundamentally fair trial at all levels of government. As the Supreme Court has explained, however, the Fifth and Fourteenth Amendments guarantee the right to a fair trial, but not to a perfect trial. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Thus, although mistakes may occur at trial, a reviewing court will none the less affirm a criminal conviction if it determines that the mistakes were harmless. To affirm a criminal conviction in the case of an error involving constitutional rights, the reviewing court must determine beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 23 (1967). For trial error that is not of constitutional dimensions, the reviewing court must determine with "fair assurance ... that the judgment was not substantially swayed by the error". Kotteakos v. United States, 328 U.S. 750, 765 (1946).

366. The Sixth Amendment guarantees federal defendants "in all criminal prosecutions ... a speedy and public trial". This right has been extended to defendants in state criminal proceedings through the due process clause of the Fourteenth Amendment. In re Oliver, 333 U.S. 257 (1948). The constitutional guarantee of a public trial does more than ensure fairness to defendants. It ensures public confidence in the fairness of the criminal justice system and responsible performance by judges and prosecutors. It also provides an outlet for community reaction to crime, and encourages witnesses to come forward and to testify truthfully. Waller v. Georgia, 467 U.S. 39 (1984). Because of these public interests, the right to a public trial is not merely a right of the criminal defendant under the Sixth Amendment. For example, the First Amendment provision that "Congress shall make no law ... abridging the freedom of speech, or of the press" has been deemed to protect the right of the public and the press to have access to a criminal trial. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (granting access to press and public to criminal trial). See also Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (state cannot prevent press and public access to criminal trials without a compelling governmental interest, narrowly tailored). The Supreme Court has also granted press access to preliminary hearings and jury voir dire. Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986) (preliminary hearings); Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) (voir dire). But see Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (denying access to pretrial suppression hearing where publicity could taint jury pool).

367. Thus, even though a defendant may offer to waive his right to a public trial and request a closed proceeding, the public and press have a constitutionally protected right of access to the trial under the First Amendment. Singer v. United States, 380 U.S. 24 (1965). The law must balance a defendant's desire for closure (motivated, for example, by a desire to protect his privacy or to reduce the possibility of adverse publicity that could deny him an impartial verdict) or the prosecution's similar desire (for example, to protect the secrecy of ongoing criminal investigations

or the privacy rights of particular witnesses or victims) against the constitutionally protected public interest in open proceedings.

368. To restrict public access to a criminal trial or to a discrete portion of one, the trial judge must find that closure is essential to preserve higher values - such as the defendant's right to a fair trial - and the closure order must be narrowly tailored to serve those values. Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501 (1984). When a court closes a trial in whole or in part, it must make specific factual findings so that a reviewing court may evaluate the propriety of the order. Moreover, the media or an individual party may make an immediate and expedited appeal to a higher court from an order closing part of the criminal proceeding.

369. Notwithstanding the right of public access to court proceedings, the decision-making process in a criminal trial, as well as in other proceedings, is not open to the public. Jurors deliberate entirely in secret so that their views can be candidly expressed without reservation. Discussions between judges or between a judge and the judge's clerk are also privileged against public disclosure.

370. Competent, independent and impartial tribunal. The Due Process clauses of the Fifth Amendment and the Fourteenth Amendment guarantee criminal defendants certain fundamental rights deemed essential to a fair trial. For example, a criminal defendant has the right to an unbiased judge, an impartial jury free from unfair influences, and a trial free of outside distractions and disruption. Due process is violated if the trial is conducted in a manner or atmosphere that likely rendered the jury unable to give the evidence reasonable consideration. The competence of the lay jury is augmented by the fact that the judge instructs the jury on applicable legal principles. Where the instructions are incorrect on critical legal points the conviction is subject to reversal. Sullivan v. Louisiana, 113 S.Ct. 373 (1993); United States v. Diaz, 891 F.2d 1057, 1062-63 (2d Cir. 1989).

371. Federal criminal trials (except trials for certain petty offences) are overseen by district court judges who are nominated by the President, and must be confirmed by the U.S. Senate, according to article III of the U.S. Constitution. Unlike the executive and legislative branches of the federal government, the judicial branch is non-political. Baker v. Carr, 369 U.S. 186 (1962). Once nominated and confirmed, article III judges serve lifetime tenure "during good behaviour". Thus, after their appointment through a political process, the judges are independent of the political branches and serve life tenure unless removed by impeachment. Art. I, section 3 cl. 6. Not only are article III judges not easily removed from office, but Congress also cannot reduce their salaries in an effort to induce their resignation. This provision protects against Congressional efforts to punish judges for past decisions or to indirectly influence future judicial decisions. Art. III, section 1.

372. Among the reasons for which article III judges may be impeached is conviction of a felony. In the history of the United States only 11 federal judges have been removed from their position by impeachment. Within the past

few years, two judges have been impeached based upon criminal convictions, and another federal judge was impeached even after having been acquitted of criminal charges.

373. Because the constitutional provision of lifetime tenure may protect judges whose competency or conduct is open to question, a federal statute provides a detailed mechanism whereby other article III judges may investigate whether a judge should be removed for misconduct or is otherwise unable to discharge all the duties of his office by reason of mental or physical incapacity. Should the investigating panel determine that the judge is not competent, they can take certain remedial action short of removing the judge from office. 28 U.S.C. section 372.

374. Another guarantee of judicial independence is the provision of absolute immunity from civil liability. Litigants unhappy with anything that occurs in the course of an investigation into their conduct or with the result of their trials cannot sue the judges. The remedy for an incorrect ruling is reversal by a higher court, not a lawsuit against the judge personally. Bradley v. Fisher, 80 U.S. 335 (1872).

375. The U.S. Constitution does not require that federal judges have legal training. However, as a practical matter, present-day federal judges are selected from among lawyers. In the confirmation process, the Senate examines, among other factors, the competence and legal experience of the judicial nominee. Once appointed, federal judges receive continuing legal and judicial education, as well as other technical and administrative support, from the Federal Judicial Center; that entity, too, is under the control of the judicial branch. 28 U.S.C. sections 620 et seq.

376. Petty offences (for which the maximum term of imprisonment is less than six months) may be prosecuted before federal magistrates, who are appointed by the judges of the district court and serve for eight years. Federal law defines the minimum qualifications for appointment to be a federal magistrate. One such requirement is that the magistrate be an attorney admitted to the practice of law for at least five years. 28 U.S.C. section 631.

377. The methods of selection and the roles of judges within the state systems vary widely. States have the power to prescribe the ways judges are selected, Sugarmann v. Dougall, 413 U.S. 634, 647 (1974); Lefkovitz v. State Board of Elections, 400 F. Supp. 1005, 1015 (N.D. Ill. 1975), aff'd, 424 U.S. 901 (1976), as well as their eligibility and qualifications, Gruenburg v. Kavanagh, 413 F. Supp. 1132 (E.D. Mich. 1976).

378. States may also set appropriate standards of conduct for their judges. Gruenburg v. Kavanagh, 413 F. Supp. at 1135. An American Bar Association Code of Judicial Conduct has been adopted by a majority of the jurisdictions in the United States, and is of hortatory if not mandatory force in others. Canon 1 of the Code of Judicial Conduct requires that "[a] judge shall uphold the integrity and independence of the judiciary". Canon 2 requires that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities". Canon 3 requires that "[a] judge shall perform the duties of judicial office impartially and diligently". This canon dictates, for example, that a judge disqualify himself or herself whenever the judge's

impartiality might reasonably be questioned. Canon 4 requires that "[a] judge shall so conduct the judge's extrajudicial activities as to minimize the risk of conflict with judicial obligations". Canon 5 requires that "a judge or judicial candidate shall refrain from inappropriate political activity".

379. To ensure that the legislative or executive power of any state is not invoked to weaken the independence of the judiciary, the constitutions of many states prescribe certain fundamental conditions under which the judicial branch operates. State court judges may be popularly elected or appointed, and may serve any length of term, as prescribed by the constitutions and statutes of individual states. Some states elect judges by popular vote. The fairness of judicial elections is governed by the Voting Rights Act of 1965, as amended in 1982. See 42 U.S.C. sections 1971 et seq. The Supreme Court has determined that for purposes of the Voting Rights Act, a judge who wins an election in the district in which the judge runs is a "representative" of that district. Chisom v. Roemer, 501 U.S. 380 (1991). This determination has resulted in the resolution and settlement of a number of lawsuits which challenged the fairness of state judicial elections.

380. Most of the states require their judges to be lawyers, or at least learned or well informed of the law. Most also provide for the removal of judges on the ground of incompetency. Finally, most states select judges by appointment, which may be made by the governor, the highest court of the state, or the state legislature.

381. Many states are beginning to adopt some type of merit selection system out of concern that the election and political appointment systems compromise judicial independence. The merit system attempts to weed out the political element at the initial stage by restricting the power of nomination to a specialized commission, usually consisting of lawyers, legal scholars, and citizens. The appointing authority, whether it is the governor, court, or legislature, can appoint judges only from the list submitted by the nomination commission. Several cases challenging the fairness of some states' merit selection systems are currently pending.

382. Due process requirements prohibit a judge from presiding over a criminal trial where the judge's impartiality may reasonably be questioned. In re Murchison, 349 U.S. 133, 138-39 (1955) (due process violated when judge charged defendants with contempt because judge could not free himself of influence of own personal knowledge of what occurred in secret grand jury session); United States v. Diaz, 797 F.2d 99, 100 (2d Cir. 1986) (per curiam) (due process violated when sentencing judge wrote letter to senator four days after trial complaining of leniency of sentences required by statutes because judge's impartiality may reasonably be questioned), cert. denied, 488 U.S. 818 (1988). In federal courts, statutes require recusal if a party to the proceeding files an affidavit showing the judge is biased or prejudiced either against such party or in favour of an adverse party, 28 U.S.C. section 144, or whenever the judge's impartiality reasonably may be questioned, 28 U.S.C. section 455(a). Recusal also would be required if the judge, the judge's spouse or other family member is a party to the proceeding, is acting as a lawyer for one of the parties, is likely to be a material witness, or has

financial interests in the proceeding. Even though the judge may not be the fact-finder at the trial, bias on the part of the trial judge can require reversal of the criminal conviction on appeal.

383. Trial by jury. The Sixth Amendment also provides that "in all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury of the State and district wherein the crime shall have been committed". This right to a jury trial applies to any federal or state offence for which imprisonment for more than six months is authorized. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). However, the right does not apply in juvenile court proceedings or military trials.

384. The right to trial by jury reflects "a profound judgment about the way in which law should be enforced and justice administered". Duncan v. Louisiana, 391 U.S. at 155. In the U.S. system, the jury is the fact-finder. Therefore, a judge may not direct the jury to return a verdict of guilty, no matter how strong the proof of guilt may be. Sparf and Hansen v. United States, 156 U.S. 51, 105-6, (1895).

385. The right to an impartial jury requires that the jury be selected from a representative cross-section of the community in which the crime was committed. The jurors must, however, be competent. In federal criminal trials there are minimum statutory standards of competency, including that the juror be at least 18 years of age, literate in English, have been a resident of the district for at least one year, otherwise physically and mentally able to sit as a juror, and not have been convicted of a felony or be currently facing a criminal felony charge. 28 U.S.C. section 1865(b).

386. To ensure the impartiality of the jury, the trial court must conduct a voir dire examination of prospective jurors to discover any potential bias. In cases of high publicity, the court must be extra cautious to ensure that jurors have not been influenced by the publicity. The trial court may exclude for cause any prospective juror who will be unable to impartially render a verdict based on the evidence. The voir dire is also designed to examine juror competency, and the trial court may excuse jurors for lack of competency (i.e. mental or physical impairment, or lack of language proficiency).

387. In addition to removal for cause, as the act of striking jurors by the judge is called, statutes provide that the parties may remove jurors through the use of peremptory challenges. Peremptory challenges permit the parties to exclude a certain number of jurors without any explanation to the court, except in limited instances. In federal criminal trials, Federal Rule of Criminal Procedure 24(b) provides that in cases punishable by death each side may exercise 20 peremptory challenges; for felonies (crimes punishable by more than one year in prison) the prosecution may use 6 peremptory challenges and the defendant or defendants jointly may exercise 10 challenges. Where there are multiple defendants the trial court may allow additional peremptory challenges to be used. While removal of jurors for cause is constitutionally based, the use of peremptory challenges to remove jurors is not a constitutional right.

388. However, where peremptory challenges are permitted, the parties may not use them deliberately to exclude members of a racial or ethnic group, or of a

particular sex. Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 499 U.S. 400 (1991); J.E.B. v. Alabama Ex Rel. T.B., 62 U.S.L.W. 4219 (19 April 1994). At the same time, the defendant also is not entitled to deliberately exclude members of a racial or ethnic group from the jury. Georgia v. McCollum, 112 S.Ct. 2348 (1992).

389. Where the jury is the fact-finding tribunal, the historic number of jurors is 12. The Supreme Court has held that the Sixth Amendment allows state juries to be composed of fewer than 12 (but more than 5) members. Williams v. Florida, 399 U.S. 78, 102-3 (1970). In federal criminal proceedings, the rules provide for a 12-member jury, but the parties may stipulate, in writing and with the approval of the court, to waive a 12-member jury. Fed. R. Crim. P. 23(b). Rule 23(b) also allows the trial judge to proceed with fewer than 12 jurors even without stipulation if the court finds it necessary to excuse a juror for just cause during deliberation. Each state may set the size of its jury so long as it is constitutionally permissible. Juries in state criminal trials usually have between 6 and 12 jurors.

390. In federal jury trials, the jury must be unanimous in returning its verdict for conviction or acquittal. Andres v. United States, 333 U.S. 740, 748-49 (1948); Fed. R. Crim. P. 31(a). If the jurors cannot agree, the judge declares a mis-trial and the government is free to prosecute the defendant again before a different jury.

391. In state jury trials, a conviction by a non-unanimous verdict of a 12-member jury satisfies the Sixth Amendment. Apodaca v. Oregon, 406 U.S. 404, 411-12 (1972) (upheld conviction by 10 votes of 12-member jury); Johnson v. Louisiana, 406 U.S. 356, 359-63 (1972) (upheld conviction by 9 votes of 12-member jury). However, if the state has a 6-member jury system, the verdict must be unanimous. Burch v. Louisiana, 441 U.S. 130, 134 (1979). The Supreme Court has not addressed the question of unanimity where the juries are composed of more than 6 but fewer than 12 members. Id. at 138 n.11.

392. Public access to judgements and records. The public and the press have the right, under the First Amendment, to records of criminal cases ending in acquittal, dismissal, or finding no probable cause, unless the state or the defendant demonstrates a compelling interest in non-disclosure, as well as to those ending in conviction. Furthermore, at common law, the public has the right to inspect and copy public records, including judicial records. Nixon v. Warner Communication, 435 U.S. 589, 598 (1978).

393. This right may be restricted in certain limited circumstances. An important exception to the rule favouring public dissemination applies to grand jury material. Information secured by the grand jury in the course of its investigation is also protected from public disclosure, both traditionally and by operation of the Federal Rules of Criminal Procedure. See Butterworth v. Smith, 494 U.S. 624, 629-30 (1990); Fed. R. Crim. Pro. 6(e). In particular, Rule 6(e)(2) provides:

> "A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under ... this subdivision shall not disclose matters

occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court."

394. Grand jury secrecy is critical to the judicial system; the Supreme Court has spoken repeatedly about "'the indispensable secrecy of grand jury proceedings'". United States v. R. Enterprises, 498 U.S. 292, 299 (1991), quoting United States v. Johnson, 319 U.S. 503, 513 (1943). Grand jury secrecy serves several distinct and compelling public interests: it encourages witnesses to come forward and testify freely and honestly; it minimizes risks that prospective defendants will flee or use corrupt means to thwart investigations; it safeguards the grand jurors themselves from extraneous pressures and influences; and it protects accused persons who are ultimately exonerated from unfavourable publicity. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). To the extent that information is secured by the grand jury in its investigation, it is presumptively non-public unless and until the judge enters an order permitting its disclosure upon a showing of specialized need. Fed. R. Crim. P. 6(e).

395. There are other instances in which the rule of public disclosure is not followed. Juvenile records may be sealed or expunged, and the public would not have access to such records outside very limited circumstances. For example, federal laws permit the disclosure of juvenile records only for certain specified purposes, such as the preparation of a pre-sentence report for another court or an ongoing investigation. 18 U.S.C. section 5038. Many states also forbid the publication of the names of rape victims or of children who are victims in criminal cases. See e.g. Florida Stat. Ann section 119.07(2)(h); Wyo. Stat. section 6-2-310. Other state's laws may strongly urge the media to exercise self-restraint but do not subject publication to some form of sanction. See e.g. Wis. Stat. section 950.055. However, such laws could be unconstitutional, as a violation of the First Amendment, if applied to journalists who receive the information from public authorities. See The Florida Star v. B.J.F., 491 U.S. 524 (1989) (civil damages on newspaper for printing rape victim's name violated freedom of the press); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam) (state court's pretrial order preventing press from publishing name/photo of juvenile charged with murder violated freedom of the press).

396. Federal law also regulates and restricts the disclosure of other sensitive information. The Classified Information Procedures Act (CIPA), 18 U.S.C. Appendix III (1980), is triggered in cases involving classified national security information. CIPA requires the trial court to conduct a hearing, upon motion of the government, to examine the use, relevance, or admissibility of the classified information. If the court authorizes the disclosure of such information, the government may, in lieu of disclosing the information, submit a statement admitting relevant facts that the information would tend to prove, or submit a summary of the information. The trial court should allow these alternative methods of disclosure "if the statement or summary will provide the defendant with substantially the same ability to make his defence as would disclosure of the specific classified information".

Id. section 6. If, however, the court decides that the classified information at issue may not be disclosed, the records of the hearing would be sealed and preserved for appeal. Id. section 6.

397. Civil cases. Guarantees of fairness and openness also are ensured in the civil context, with federal and state constitutions providing basic and essential protections. While protections in civil disputes might not match those that exist in criminal proceedings, the fundamental features of the United States judicial system - an independent judiciary and bar, due process and equal protection of the law - are common to both.

398. Most importantly, the Due Process and Equal Protection clauses of the Constitution - applicable to the states through the Fourteenth Amendment - mandate that judicial decision-making be fair, impartial, and devoid of discrimination. Neutrality, of course, is the core value. As members of the Supreme Court repeatedly have emphasized, "the right to an impartial decision maker is required by due process" in every case. Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part). Indeed, because the "appearance of evenhanded justice ... is at the core of due process", Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring), the Court has held that even decision makers who in fact "have no actual bias" must be disqualified if there might be an appearance of bias. Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972). See also Goldberg v. Kelly, 397 U.S. 254, 271 (1971). Specifically, this means that a judge possessing a personal interest in a case should be precluded from taking part in it, Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (a person "with substantial pecuniary interest in legal proceedings should not adjudicate these disputes"); a judge may not "give vent to personal spleen or respond to a personal grievance" in reaching a decision, Offut v. United States, 348 U.S. 11, 14 (1954), and a hearing must be "conducted by some person other than one initially dealing with the case". Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972). In short, impartiality and fairness are guaranteed by the Due Process clause.

399. Neutrality also means the absence of discrimination. As is the case with criminal trials, the Equal Protection clause bars the use of discriminatory stereotypes in the selection of the jury in civil cases. As the Supreme Court held in Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 628 (1991): "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."

400. Fairness of civil proceedings also is ensured by the requirement that where they might result in serious "hardship" to a party adversary hearings must be provided. For instance, where a dispute between a creditor and debtor runs the risk of resulting in repossession, the Supreme Court has concluded that debtors should be afforded a fair adversarial hearing. See Fuentes v. Shevin, 407 U.S. 67 (1972). See also Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

401. This is particularly true in civil cases involving governmental action, where the Supreme Court, since the 1970s and the landmark case of Goldberg v. Kelly, supra, has recognized the importance of granting procedural rights to individuals. Depending on the seriousness of the private interests at stake, the U.S. Constitution mandates different types of guarantees in civil proceedings involving the government: an unbiased tribunal; notice to the private party of the proposed action; an opportunity to be heard and/or the right to present evidence; and the right to know the government's evidence, to cross-examine and present witnesses, and to receive written findings from the decision maker. Applying these principles, the Court has thus held that persons have had a right to notice of the detrimental action, and a right to be heard by the decision maker. Grannis v. Ordean, 234 U.S. 385, 394 (1918) ("The fundamental requisite of due process of law is the opportunity to be heard"); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare entitlements cannot be interrupted without a prior evidentiary hearing). When action is taken by a government agency, statutory law embodied in the Administrative Procedures Act also imposes requirements on the government, such as the impartiality of the decision maker and the party's right to judicial review of adverse action. As Justice Frankfurter once wrote, the

> "validity and moral authority of a conclusion largely depend on the mode by which it was reached ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J. concurring).

402. Although inequalities in wealth distribution certainly have an impact on individuals' access to the courts and to representation, the equal protection components of state and federal constitutions have helped smooth these differences. In particular, the Supreme Court has held that access to judicial proceedings cannot depend on one's ability to pay where such proceedings are "the only effective means of resolving the dispute at hand". Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971) (holding unconstitutional a state law conditioning a judicial decree of divorce upon the claimant's ability to pay court fees and costs).

403. Inequalities remain, though, in part because neither the Constitution nor federal statutes provide a right to appointed counsel in civil cases. None the less, the Supreme Court has made it easier for indigent parties to afford legal representation by invalidating prohibitions against concerted legal action. The Court has thus recognized a right for groups to "unite to assert their legal rights as effectively and economically as practicable". United Trans. Union v. State Bar of Michigan, 401 U.S. 576, 580 (1971).

Presumption of innocence in criminal trials

404. In both federal and state prosecutions, the presumption of innocence is an essential aspect of the constitutional requirement of due process.

405. The presumption of innocence means that the government bears the burden of proving every element of the charged crime beyond a reasonable doubt. Sullivan v. Louisiana, 113 S.Ct. 2078, 2080 (1993); In re Winship, 397 U.S. 358, 364 (1970). The defendant bears no burden at trial of calling witnesses or introducing any tangible evidence, nor is the defendant obliged to testify. The U.S. Supreme Court has explained that "[t]he principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law". Coffin v. United States, 156 U.S. 432, 453-54 (1895) (reversing convictions and remanding for a new trial where trial judge had refused to instruct jury that the defendants were entitled to the presumption of innocence). The Court went on to define the presumption of innocence as

> "a conclusion drawn by the law in favour of the citizen ... an instrument of proof created by the law in favour of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." Id. at 458-59.

406. In a subsequent decision, the Court explained that the "presumption of innocence is a doctrine that allocates the burden of proof in criminal trials. It also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial". Bell v. Wolfish, 441 U.S. 520, 534 (1979).

407. But, the Court explained, the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun". Id. at 534. Thus, the presumption of innocence does not limit the right of the government to arrest a person charged with a crime, to detain the person pending trial, or to govern conditions of pretrial detention. In accordance with this view, the Supreme Court has also upheld the constitutionality of pretrial detention of indicted persons if no conditions of release will reasonably assure his or her appearance at trial and the safety of any other person and the community. United States v. Salerno, 481 U.S. 739 (1987). The federal statute that governs decisions regarding pretrial detention or release explicitly provides that "[n]othing ... shall be construed as modifying or limiting the presumption of innocence". 18 U.S.C. section 3142(j).

Rights of the accused

408. **Right to be informed promptly and in detail of the charges**. As discussed in the context of article 9, the Sixth Amendment guarantees that criminal defendants have the right "to be informed of the nature and cause of the accusation". This guarantee applies in both state and federal courts.

409. The Federal Rules of Criminal Procedure require that an arrested person must be taken "without unnecessary delay before the nearest available federal magistrate". Fed. R. Crim. P. 5. If the arrest was made without a warrant, a complaint must be filed "forthwith" in compliance with the probable cause

requirement of Fed. R. Crim. P. 4. The purpose of the initial appearance is to inform the defendant of the charges and advise the defendant of the right to remain silent, right to counsel, the right to a preliminary hearing and the fact that any statement made by the defendant can be used against the defendant. The magistrate is also required to inform the defendant of the "general circumstances under which the defendant may secure pretrial release". The initial appearance and procedure for pretrial release are discussed under article 9.

410. The Federal Rules do not impose a time-frame for informing the defendant of the charges. However, the U.S. Supreme Court recently enunciated a rule that a probable cause determination must be made within 48 hours of a warrantless arrest. County of Riverside v. McLaughlin, 500 U.S. 44 (1991). That decision clarified a 1975 decision in which the Supreme Court held that an individual detained as a result of a warrantless arrest is entitled to a "prompt" judicial determination of probable cause. Gerstein v. Pugh, 420 U.S. 103 (1975). Gerstein permitted States to have flexibility in adopting procedures for determining probable cause; in County of Riverside, the Court created a presumption that delays of more than 48 hours in determining probable cause following warrantless arrests are unconstitutional.

411. The right of the accused to be informed of the charges in a language the accused understands is also linked to the Fifth Amendment right to due process of law. The use of interpreters in the federal court system is discussed in more detail in the context of article 14(3)(f), below.

412. **Right to prepare defence and to communicate with counsel.** Defendants retained in custody acquire their Sixth Amendment right to counsel when formal adversarial judicial proceedings are initiated against them. Brewer v. Williams, 430 U.S. 387, 398 (1977). In contrast, the right to the presence of an attorney during custodial interrogation, which is grounded on the Fifth and Fourteenth Amendments, protects against self-incrimination, and can be waived by the defendant. Edwards v. Arizona, 451 U.S. 477, 481-82 (1981). In the defendant's first appearance before the magistrate or judge, at the point that the defendant is informed of the charges and his rights, the magistrate must also allow reasonable time for the defendant to consult with the defendant's attorney. Fed. R. Crim. P. 5(c). If the defendant is detained pending trial, this right of consultation continues for the duration of the detention. In Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989), the court stated:

> "[p]re-trial detainees have a substantial due process interest in effective communication with their counsel and in access to legal materials. When this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised."

413. The right to consult with counsel includes the right of private consultation. United States ex rel. Darcy v. Handy, 203 F.2d 407 (3rd Cir. 1953). If a defendant is in custody the police or prison authorities cannot place undue restrictions on access to counsel. See e.g. Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973) (prison officials enjoined from requiring the use of phones and partitioned visiting rooms for attorney-client conferences);

Lewis v. State, 695 P.2d 528 (Okl. Crim. App. 1984) (police must maintain procedures to ensure a person in custody can exercise the right to consult with counsel).

414. Under the Federal Rules of Criminal Procedure, the defendant is accorded the time and opportunity to begin preparation of a defence almost immediately after the arrest. Federal Rule of Criminal Procedure 5 requires the magistrate, at the initial appearance of the defendant, to "allow the defendant reasonable time and opportunity to consult counsel". The right to counsel, as noted elsewhere, attaches at the formal initiation of criminal proceedings and continues through the appellate stage.

415. A criminal defendant must sometimes strike a balance between the need to have adequate time to prepare a defence and the desire for a speedy trial. The Sixth Amendment guarantees a criminal defendant the right to a speedy trial. To help ensure compliance in federal courts with this constitutional requirement, Congress enacted the Speedy Trial Act of 1974, 18 U.S.C. sections 3161 et seq. That statute imposes specific time limits on the government for completion of various stages of the prosecution (e.g. filing the indictment or information within 30 days of the arrest or service of summons, commencement of trial within 70 days of the filing of the indictment or date of the initial appearance, whichever is later.) However, Congress has also recognized the need to permit a defendant to have adequate time to prepare for trial. Therefore, the Speedy Trial Act was amended to prevent the government from beginning a trial sooner than 30 days after the defendant's initial appearance before the court, unless the defendant consents to an early trial. 18 U.S.C. section 3161(c)(2).

416. The Sixth Amendment also guarantees a defendant the right to counsel. This right has been interpreted to embrace the right to counsel of the defendant's own choice. For an indigent defendant, the right requires that the court appoint competent counsel if the defendant cannot afford to retain an attorney. Gideon v. Wainwright, 372 U.S. 335 (1963). However, while the right to counsel is absolute, the right to counsel of choice is a qualified one, to be balanced against state interests in judicial efficiency and in the integrity of the process. Morris v. Slappy, 461 U.S. 1 (1982). For example, the court has the discretion to disqualify a defendant's chosen lawyer for actual or even potential conflict of interest. Wheat v. United States, 486 U.S. 153 (1988). Additionally, the court can balance the need for expeditious proceedings against the request of a defendant to discharge the attorney and substitute a new one, where the choice of counsel will result in delay of the trial. United States v. Richardson, 894 F.2d 492 (1st Cir. 1990).

417. U.S. understanding. In its instrument of ratification, the United States noted its understanding with respect to the right to counsel as follows:

> "[S]ubparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed."

418. **Right to trial without undue delay**. The Sixth Amendment guarantees that "[in] all criminal prosecutions, the accused shall enjoy the right to a [speedy and public trial] ....". The speedy trial protection applies to state as well as federal prosecutions. In re Oliver, 333 U.S. 257 (1948). In federal courts, the right is implemented by the Speedy Trial Act, 18 U.S.C. sections 3161 et seq., discussed below.

419. The right to a speedy trial under the Sixth Amendment is triggered by the filing of formal charges. Delay occurring before charges are filed is not a Sixth Amendment issue; the statutes of limitation, which begin to run from the time the offence is committed, serve as the primary protection against undue preindictment delay. But there may be undue delay even when the charges are brought within the appropriate statute of limitations. When that occurs, the Due Process clause of the Fifth Amendment (the protections of which also apply to persons charged in state courts by virtue of the Fourteenth Amendment) may protect the accused. To prevail on a constitutional claim of preindictment delay, the accused must show that the delay resulted in actual and substantial prejudice and was improperly motivated in order to disadvantage the accused.

420. The Sixth Amendment, which protects a defendant's right to a speedy trial after arrest or indictment, is designed to minimize pretrial incarceration or impairment of liberty pending trial and the disruption of life while criminal charges are outstanding; it also is designed to limit the possibility that the defence will be impaired by the passage of time. If the delay constitutes an impairment of the defendant's constitutional speedy trial right, the court will dismiss the criminal charges with prejudice - thereby barring the government from reinstituting the same charges in a new indictment.

421. Where an accused raises a claim of post-indictment delay under the Sixth Amendment, the courts apply a four-part test originally fashioned by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). The factors include the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice that the defendant may have suffered on account of the delay.

422. The first factor, length of delay, is the "triggering mechanism". Unless the court finds the delay excessive on its face, it will not examine the remaining factors. The second factor is the reason for the delay. Where the government acts deliberately and causes the delay, the factor is weighted more heavily against it; where the reasons for the delay are neutral, they are not weighted heavily against the government; and where the delay is occasioned by the defendant, that factor is weighted against the defendant. Courts will also consider whether the defendant has asserted the right to a speedy trial; where the defendant has not done so, the failure to assert the right will make it difficult for the defendant to later argue that he was denied a speedy trial. The final factor is prejudice to the defendant. When determining prejudice the courts consider whether the defendant has been in custody or suffered restrictions on liberty pending trial, whether the defendant faced anxiety and public opprobrium while the criminal charges are pending, and whether the delay has impaired the defendant's ability to defend himself.

423. The federal Speedy Trial Act. The right to a speedy trial is implemented in federal courts by the Speedy Trial Act, 18 U.S.C. sections 3161 et seq., and by the requirement that the federal district courts implement local plans for the speedy disposition of criminal cases.

424. The Speedy Trial Act first requires that a person arrested on a complaint, who under the Sixth Amendment has a right to be charged by indictment returned by a grand jury, must be indicted within 30 days of arrest; that period may be extended for another 30 days if the grand jury has not met within the first 30 days. 18 U.S.C. section 3161(b). If the detainee has not been indicted within that time, the government must dismiss the charges and release the detainee.

425. After the indictment has been returned, the defendant must be tried within 70 days of the return of the indictment or the defendant's first appearance before a magistrate, whichever occurs last. 18 U.S.C. section 3161(c)(1). Certain intervals are excludable from computation of the 70-day-to-trial period, including delays resulting from proceedings to determine competency or while the defendant is incompetent or physically unable to stand trial, to resolve other criminal charges, to hear pretrial motions, to transfer the case to another district, to consider the possibility of a plea agreement, and while the parties attempt to locate another defendant or witness or evidence. The court may also continue the trial if it finds that the ends of justice are best served by the delay and if it makes a specific explanation on the written record. 18 U.S.C. section 3161(h).

426. If the 70-day-to-trial period has expired, the court may dismiss the indictment with or without prejudice. 18 U.S.C. section 3162. Dismissal with prejudice means that charges cannot be refiled. The Speedy Trial Act provides that the court should consider, among other factors, the seriousness of the offence, the facts and circumstances that led to the dismissal, and the impact of reprosecution on the administration of the statute and the administration of justice. If either the prosecutor or the defence counsel acts deliberately to violate the defendant's rights under the Speedy Trial Act the court may also impose personal sanctions on the attorney.

427. State constitutions and statutes. As noted previously, states may impose limitations and follow procedures that are more, but not less, protective of individual rights than required by the U.S. Constitution. Many states have enacted speedy trial acts similar to the federal statute. States differ on whether speedy trial rights apply to juveniles. Florida includes a speedy trial provision in its Rules of Juvenile Procedure. Fla. R. Juv. P. 8.090 (as amended in 1991 and 1992); State v. Perez, 400 So.2d 91 (Fla. Ct. App. 1981). Other states may consider delinquency proceedings as civil matters to which speedy trial acts are not applicable. See Robinson v. State, 707 S.W.2d 47 (Tex. Ct. Crim. App. 1986); Matter of Beddingfield, 257 S.E.2d 643 (N.C. Ct. App. 1979).

428. Right to be tried in own presence and to defend in person. The "constitutional right to presence" at trial is rooted in the Confrontation clause of the Sixth Amendment and the Due Process clause of the Fifth Amendment. United States v. Gagnon, 470 U.S. 522, 526 (1985) (per curiam). The Confrontation clause has been held to be applicable to the states through

operation of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). In another case involving a state prosecution, the U.S. Supreme Court declared that "the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge". Snyder v. Massachusetts, 291 U.S. 97, 105-6 (1934).

429. Federal law requires that non-corporate defendants be present at every major stage in a prosecution, including arraignment, entry of plea, all stages of trial and sentencing. Exceptions apply in cases in which the defendant has voluntarily absented himself or herself after the trial has commenced, or has been removed by the court for disruptive behaviour after warnings, as well as in cases involving offences punishable by fine or imprisonment for not more than one year, if the defendant has consented in writing to trial in absentia. Corporate defendants may appear by counsel in any case. Fed. R. Crim. P. 43. In a state proceeding, the defendant's absence from a court hearing is not always a violation of the Due Process or Confrontation clauses, although he has a guaranteed right to be present at critical stages, but depends on whether "his presence would contribute to the fairness of the procedure". Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (no violation when Kentucky defendant was excluded from hearing on competency of a child witness to testify); McMillian v. State, 594 So.2d 1253, 1270 (Ala. Cr. App. 1991) (no violation where defendant's lawyer argued motion for mistrial during trial intermission after state judge had inquired whether lawyer wanted client present).

430. When a defendant flees during the trial the proceedings may continue to verdict even in the defendant's absence, though the defendant cannot be sentenced in absentia. Bartone v. United States, 375 U.S. 52 (1963). However, in Crosby v. United States, 113 S.Ct. 748 (1993), the Supreme Court held that Fed. R. Crim. P. 43 prohibits the trial in absentia of a defendant who is not present at the start of trial. The Court found a rational distinction between flight before and during trial, for the purpose of deciding whether to permit the trial to proceed in the defendant's absence. The defendant's presence at the commencement of trial bolsters a later finding that the costs of delaying the trial would be unjustified; it also helps to ensure that the defendant's waiver is knowing and voluntary and deprives the defendant of the option of terminating a trial that does not appear to be going in his or her favour.

431. **Right to legal assistance of own choosing**. The right to counsel in all federal criminal prosecutions is provided for by the Sixth Amendment. This right has been extended to state courts through operation of the Due Process clause of the Fourteenth Amendment. In the landmark case of Gideon v. Wainwright, 372 U.S. 335 (1963), the U.S. Supreme Court mandated that every indigent person accused of a felony in a state court must be provided with counsel. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court extended this rule to provide for the appointment of counsel to indigent persons charged with any offence, including misdemeanours, which could result in incarceration.

432. For purposes of the Sixth Amendment, this right attaches from the time of the initial appearance before the court. Fed. R. Crim. P. 44(a) reads as follows:

> "Right to assigned counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate or the court through appeal, unless that defendant waives such appointment."

Rule 44 comports with a series of Supreme Court decisions regarding the right to appointed counsel at critical stages of a prosecution. White v. Maryland, 373 U.S. 59 (1967) (preliminary hearing at which a guilty plea had been entered before a magistrate); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment at which certain defences were deemed waived if not pleaded); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing to determine if sufficient evidence exists to present case to grand jury and if so to fix bail); United States v. Wade, 388 U.S. 218 (1967) (post-indictment line-up); Mempa v. Rhay, 389 U.S. 128 (1967) (sentencing hearing).

433. Courts have also held that the Sixth Amendment guarantee of the assistance of counsel also protects the defendant's right to represent himself or herself without the assistance of counsel if the defendant so chooses. Faretta v. California, 422 U.S. 806 (1975). That right is qualified, however, by requirements that it be asserted in a timely fashion and that the defendant abide by procedural rules and requirements of courtroom protocol. The court must also ensure that a defendant's waiver of the right to the assistance of counsel is knowing and intelligent. Moreover, the court may appoint standby counsel over the objection of the defendant. McKaskle v. Wiggins, 465 U.S. 168 (1984).

434. As discussed under article 9, even before the commencement of judicial proceedings, an accused person has a right to counsel under the Fifth Amendment, if he or she is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966). Police must inform a suspect, prior to questioning, that the person has a right to remain silent, that any statements made by the suspect can be used against the suspect in court, that the suspect has the right to have an attorney present, and that an attorney will be appointed for the suspect if the suspect cannot afford to retain one. Rule 5 of the Federal Rules of Criminal Procedure requires a magistrate to inform a defendant of these rights during the initial appearance of the accused in court.

435. **Right of confrontation**. The Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him, and to have compulsory process for obtaining witnesses in his favor". These rights extend to state prosecutions through the Due Process clause of the Fourteenth Amendment.

436. The Confrontation clause guarantees a defendant the right to be present at any stage at which the defendant's presence would contribute to the defendant's opportunity for effective cross-examination, and at any stage of a criminal proceeding that is "critical to its outcome if his presence would

contribute to the fairness of the procedure". Kentucky v. Stincer, 482 U.S. 730 (1987). The defendant may waive this right to be present by voluntarily failing to appear in the courtroom, Taylor v. United States, 414 U.S. 17, 19-20 (1973), or by continued disruption of the proceeding after warnings from the court, Illinois v. Allen, 397 U.S. 337, 342 (1970).

437. Although face-to-face confrontation of adverse witnesses at trial by the defendant is protected by the Confrontation clause, this is not an absolute right. Maryland v. Craig, 497 U.S. 836, 844 (1990) (upholding child witness' testimony by one-way closed circuit television). The clause chiefly is concerned with ensuring reliable testimony. Therefore, the meeting requirement can be waived with a proper showing of necessity, where the furtherance of an important public policy is at stake and the witness in question testifies under oath, subject to full cross-examination, and can be observed by judge, jury, and the defendant. Id. at 850, 857. A criminal defendant may waive the right to a face-to-face confrontation by preventing a witness from testifying, United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984), or by failing to make a timely objection to the violation, United States v. Gagnon, 470 U.S. 522, 527 (1985) (per curiam).

438. The Confrontation clause also guarantees criminal defendants the "opportunity for effective cross-examination", but does not require that the defendant cross-examine witnesses. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis in original). In cross-examination, the defendant has the right to test the witness' credibility and knowledge of the facts relevant to the case. If a witness invokes the Fifth Amendment privilege against self-incrimination and remains silent, and this invocation of the witness' right prevents the defence from inquiring into relevant issues, the court may strike the witness' direct testimony. The court may also limit cross-examination if questions are prejudicial, irrelevant, cumulative, collateral, unsupported by facts, confusing, or if they may jeopardize an ongoing government investigation. See United States v. Balliviero, 708 F.2d 934, 943 (5th Cir. 1983) (Confrontation clause not violated when court prohibited use of transcript of witness' sentence reduction hearing because use would jeopardize ongoing government investigation), cert. denied, 464 U.S. 939 (1983); United States v. Hirst, 668 F.2d 1180, 1184 (11th Cir. 1982) (Confrontation clause not violated when court limited inquiry into confidential informant's criminal activities because further responses would impair government investigation).

439. The admission into evidence of hearsay statements (statements made by an out-of-court declarant, recounted at trial by another, and offered for the truth of the matter asserted) against a defendant implicates the defendant's confrontational right, because the defendant cannot confront the out-of-court declarant. However, if the prosecution can establish that the declarant is unavailable at trial and that the statement introduced is sufficiently reliable, these out-of-court statements may be admitted. To establish that a declarant is unavailable, the government must show that it is unable to bring the declarant to trial despite good-faith efforts to do so. Reliability may be established if the statement falls within an established exception to the hearsay rule, or if the prosecution shows that the statement has a particularized guarantee of trustworthiness.

440. The Compulsory Process clause of the Sixth Amendment guarantees a defendant the right to obtain the attendance of witnesses on the defendant's behalf. To exercise this right, the defendant must show that the witness' testimony would be material, favourable to the defence, and not merely cumulative. See United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 873 (1982). Furthermore, a defendant may not be able to compel testimony from a witness who chooses to invoke the Fifth Amendment privilege against self-incrimination. In its instrument of ratification, the United States noted its understanding that paragraph 3(e) of article 14 "does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defence".

441. In applying criminal procedural rules, a state may not limit arbitrarily a defendant's ability to secure the testimony of favourable witnesses. Washington v. Texas, 388 U.S. 14 (1967) (Texas law permitting a codefendant to testify as a prosecution witness, but not in favour of defendant, violated right to have compulsory process for obtaining witnesses in defendant's favour). A state cannot rigidly apply otherwise valid rules if the defendant's right to compulsory process or basic notions of due process are abridged. For example, in Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court held that applying state rules limiting cross-examination of a party's own witness and excluding hearsay statements actually denied the defendant a fair trial.

442. The Compulsory Process clause also prohibits government prosecutors from intimidating or threatening potential defence witnesses to discourage them from testifying for the defendant. It is not clear whether prosecutors have the duty to take affirmative steps to secure the testimony of potential defence witnesses. See Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

443. The Compulsory Process clause, however, does not guarantee that the defendant obtains the attendance of witnesses under precisely the same conditions as adverse witnesses. In general, a criminal defendant has no absolute right to have witnesses brought into court at public expense. The Compulsory Process clause does not give witnesses a right to claim fees from the government, unless required by statutes. Under the federal rules, the defendant may ask the court to issue a subpoena to compel the attendance of a witness at federal expense only after establishing that (i) the defendant is financially unable to pay the fees of the witness and (ii) that the presence of the witness is necessary to an adequate defence. If the court issues the subpoena, the rule requires that the cost and witness fees "be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed on behalf of the government". Fed. R. Crim. P. 17(b). Each state may have different procedural regulations regarding the payment of subpoena costs and witness fees. Once in court, however, the same procedural and evidentiary rules apply to witnesses for all parties.

444. **Assistance of an interpreter**. The right of a criminal defendant to be assisted by an interpreter if the defendant cannot understand or speak the language used in court is implicit in both the Due Process clause of the Fifth Amendment and the Confrontation clause of the Sixth Amendment. This right is accorded in federal and state practice.

445. In United States Ex. Rel. Negron v. State of New York, 434 F.2d 386, 389 (2d Cir. 1970), the Second Circuit held that without the benefit of an interpreter, the trial of a defendant who spoke no English "lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment". In addition, the inability to understand the language at trial impairs the defendant's right to confront witnesses against him; like the due process protections of the Fifth Amendment, the criminal defendant's Sixth Amendment right to confrontation is applicable to state prosecutions through the Fourteenth Amendment as well. Pointer v. Texas, 380 U.S. 400 (1965).

446. Rule 28 of the Federal Rules of Criminal Procedure provides:

> "The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct."

The notes of the Advisory Committee on Rules explain that Rule 28 uses:

> "[g]eneral language ... to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel."

447. Rule 43(f) of the Federal Rules of Civil Procedure is the civil counterpart to Rule 28. It governs the use of interpreters for taking testimony in civil cases. In addition, the Court Interpreters Act, 28 U.S.C. section 1827, requires the administrative arm of the federal court system to establish and maintain a programme for the provision of certified court interpreters in criminal proceedings and in civil actions initiated by the United States. 28 U.S.C. section 1827(d) provides that the "presiding judicial officer" (i.e., U.S. district court judge, U.S. magistrate, or bankruptcy referee) shall, either sua sponte or on motion of a party (including a criminal defendant), order the use of an interpreter if the defendant or a witness "speaks only or primarily a language other than the English language ...". Although the court has discretion in deciding whether to use an interpreter, 28 U.S.C. section 1827(e)(2) ensures that:

> "In any criminal or civil action in a United States district court, if the presiding judicial officer does not appoint an interpreter under subsection (d) of this section, an individual requiring the services of an interpreter may seek assistance of the clerk of the court or the Director of the Administrative Office of the United States Courts in obtaining the assistance of a certified interpreter."

448. Other federal statutes authorize the use and payment of interpreters in depositions to authenticate foreign public documents in criminal cases. 18 U.S.C. sections 3493, 3495, 3496. Interpreters are subject to the same procedural rules regarding qualifications as are other expert witnesses. Fed. R. Crim. P. 604.

449. Most states recognize that non-English-speaking criminal defendants have a right to an interpreter. Two states provide for such interpreters in their state constitutions: California and New Mexico. Cal. Const. art. 1, section 14; N.M. Const. art. 2, section 14. Otherwise, the right is found in regulations or statutes. V.A.M.S. section 476.060 (Missouri); Ohio Rev. Code Ann. section 2311.14 (civil cases); Ohio Rev. Code Ann. section 2335.09 (criminal cases).

450. Protection against self-incrimination. The Fifth Amendment provides that "No person shall be ... compelled in any criminal case to be a witness against himself". This constitutional protection of the individual's right against self-incrimination in criminal cases is applicable to the states as well as the federal government.

451. The Fifth Amendment thus prohibits the use of involuntary statements. It not only bars the government from calling the defendant as a witness at his trial, but also from taking statements from the accused against the accused's will. If a defendant confesses, he may seek to exclude the confession from trial by alleging that it was involuntary. The court will conduct a factual inquiry into the circumstances surrounding the confession to determine if the law enforcement officers acted in a way to pressure or coerce the defendant into confessing and, if so, whether the defendant lacked a capacity to resist the pressure. Colorado v. Connelly, 479 U.S. 157 (1986). Physical coercion will render a confession involuntary. Brown v. Mississippi, 297 U.S. 278 (1936).

452. An individual's right against compelled self-incrimination applies regardless of whether charges have been formally filed. To ensure that the individual has knowingly waived Fifth Amendment rights when he gives a statement during questioning by government agents, the investigating officer conducting a custodial interrogation is obligated to inform the suspect that the suspect has a right to remain silent, that anything he says can be used against him, and that the suspect has a right to speak with an attorney before answering questions. Miranda v. Arizona, 384 U.S. 436 (1966). If the questioner does not follow this procedural step, evidence obtained through the interrogation cannot be used at the defendant's criminal trial. If the defendant is given the proper warnings and waives these rights, any statement and information derived as a result of that statement may be used as evidence at a subsequent criminal trial.

453. Thus, the Fifth Amendment guarantees that persons have the right to refuse to testify as to matters which would incriminate them. There are times, however, when the Government deems a person's testimony, even though it would be self-incriminating, to be essential. The federal immunity statute, 18 U.S.C. sections 6001 et seq., addresses the accommodation between the right of government to compel testimony, whether before a grand jury or at trial, and the individual's right to remain silent. In re Special Grand Jury, 480 F. Supp. 174, 177-78 (E.D.Wis. 1979). A witness is entitled to immunity from criminal prosecution if compelled to testify despite the constitutional privilege. Gardner v. Broderick, 392 U.S. 273, 279 (1968). When immunity has been ordered, the federal immunity statute, 18 U.S.C. section 6002, explains the reach of that immunity for testimony compelled in federal proceedings: "no testimony or other information compelled under the order (or any

information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order" (emphasis added). The immunity protects witnesses from the use of their compelled testimony in any later prosecution, regardless whether it is a state or federal prosecution. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

454. Under 18 U.S.C. section 6003, the U.S. Attorney (chief federal prosecutor) for a federal district, with the approval of the Attorney General or other statutorily specified Department of Justice official, has the discretion to request and obtain a court order requiring "any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States ... to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination" if, in the U.S. Attorney's judgment, "(1) the testimony or other information ... may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination". 18 U.S.C. section 6003 (b). Section 6004 authorizes compulsion and immunity orders in certain administrative proceedings, when approved by the Department of Justice. Section 6005 provides for court-ordered immunity for witnesses called to testify in a congressional hearing; that provision does not require prior Department of Justice approval but it does require that Congress give 10 days' notice to the Justice Department in advance of its conferral of immunity.

455. The government is not obligated to grant immunity. United States v. Lang, 589 F.2d 92, 123 (2d Cir. 1978). If the government refuses to grant immunity, however, a defendant may exercise his usual rights under the Fifth Amendment. United States v. Karas, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). In sum, testimony compelled from a witness under a grant of immunity must leave the witness and the government in substantially the same positions as if the witness had exercised the right to remain silent. United States v. North, 910 F.2d 843 (D.C. Cir. 1990); United States v. Semkiw, 712 F.2d 891, 894 (3d Cir. 1983). The government will be precluded from using a witness's compelled testimony against the witness, but may prosecute that witness for offences that this evidence concerned if the government can prove that it obtained sufficient evidence from a legitimate source wholly independent of the compelled testimony. Kastigar v. United States, 406 U.S. 441, 460 (1972).

456. State statutes similarly govern grants of immunity by the respective states. Some restrict the types of cases in which immunity may be offered. For example, Connecticut provides for immunity only in grand jury investigations or trials of specified, serious offences. Conn. Gen. Stat. section 54-47 a (1989). However, just as under federal law, the scope of the constitutional privilege and scope of state-granted immunity are coextensive:

> "No witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence,

and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence."

Conn. Gen. Stat. section 54-47 a (b).

457. Other states, however, grant full transactional immunity for compelled testimony. "Transactional immunity" forbids prosecution of the witness for the offence to which the compelled testimony is related. Since United States citizens are protected both by the United States Constitution and their own states' constitutions - which may provide protections broader, but not narrower, than the U.S. Constitution - states may expand on the protections required by the Constitution and federal law. Transactional immunity granted by a state does not prevent federal prosecution for the same transaction; the defendant's protection is limited to use immunity. United States v. Anzalone, 555 F.2d 317, 320-321 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978). "Use immunity" forbids compelled testimony and its fruits from being used against the witness in any way related to the criminal prosecution of the witness. However, the trend in the states is also to cut back from full transactional immunity to use and derivative use immunity.

458. Finally, there are instances, such as post-immunity prosecutions for perjury, where, notwithstanding the grant of use immunity, the testimony itself or its substance may be introduced against the individual.

Review of conviction and sentence

459. All criminal conviction and sentences in the U.S. criminal justice system are subject to review. Direct appeal is the primary avenue for review of a conviction or sentence in a criminal case. The normal review, whether called an appeal or a proceeding in error, is confined to consideration of the record below, with no new testimony taken or new issues raised in the appellate court.

460. The right to direct appeal of a conviction in a criminal case has not been regarded under the law as a due process protection or otherwise guaranteed by the U.S. Constitution. McKane v. Durston, 153 U.S. 684, 687-88 (1894). However, under federal law criminal defendants have a statutory right to appeal their convictions or sentences to the intermediate court of appeals. See 28 U.S.C. section 1291 (statutory right to appeal from final judgements, including criminal judgements of conviction and sentences, in federal district court); 18 U.S.C. section 3742 (providing a statutory right to defendants to appeal their sentences). If unsuccessful on appeal, they have a right to seek review (petition for a writ of certiorari) by the U.S. Supreme Court. However, unlike the absolute obligation of appellate courts to accept the appeals brought from district court, the Supreme Court has discretion to decline to hear the case.

461. Every state also provides, either by state constitution (e.g. Florida, State ex rel. Cheney v. Rowe, 11 So.2d 585, 152 Fla. 316 (1943); Pennsylvania, Commonwealth v. Passaro, 476 A.2d 346, 504 Pa. 611 (1984); Indiana, Bozovichar v. State, 103 N.E.2d 680, 230 Ind. 358 (1952); Alabama (Const. art. 1, section 6; Delaware (Const. art. I, section 7)) or statute (Connecticut, State v. Curcio, 463 A.2d 566, 191 Conn. 27 (1983); Maryland, Cubbage v. State, 498 A.2d 632, 304 Md. 237 (1985)), or both, that criminally convicted defendants have a right to appeal their convictions and/or sentences. State prisoners whose appeals throughout the state's system have been unsuccessful may also file petitions for a writ of certiorari in the Supreme Court.

462. Moreover, individuals who allege their convictions or punishments are in violation of federal law or the Constitution may seek review in federal court by way of an application for a writ of habeas corpus. Ex parte Bollman, 8 U.S. (4 Cranch) 74, 95 (1807); Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976); Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). State prisoners in custody may seek federal court review on the ground that they are in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. sections 2241, 2254. The prisoner seeking federal review must first exhaust all state appellate remedies. 28 U.S.C. section 2254 (b), (c). All states, as noted above, guarantee the right to appeal a conviction to at least one higher court, and a right of discretionary review by (if not of direct appeal to) the state's highest court. All states provide some form of collateral relief, either a writ of habeas corpus or error coram nobis, or under specific statutory post-conviction relief procedures.

463. In such cases, federal courts ordinarily will not resolve claims that the prosecution was inconsistent with requirements under state laws or procedures that are not of constitutional magnitude. Estelle v. McGuire, 112 S.Ct. 475, 479-80 (1991); Pulley v. Harris, 465 U.S. 37, 41-2 (1984). If the prisoner's application to a federal district court for habeas corpus relief is denied, he has a right to appeal that denial to the federal court of appeals; if that is denied, he may file a petition for a writ of certiorari and thereby ask the Supreme Court to hear his case.

464. A federal prisoner in custody may also seek habeas corpus relief in the same federal court in which the conviction was entered on the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court had no jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized by law, or any other ground by which the conviction and sentence may be challenged. 28 U.S.C. section 2255. Ordinarily a petition under section 2255 is not permitted to substitute for a direct appeal, but it does provide a substantial right to additional review, particularly for issues that could not have been raised in the direct appeal from the conviction.

Right to compensation for miscarriage of justice

465. As discussed under article 2, United States law provides a variety of mechanisms by which victims of illegal arrests or other miscarriages of justice may seek to obtain compensation. For example, federal law provides an enforceable right to seek compensation against officers or employees of the

federal government alleged to have committed a violation of constitutionally protected rights. Bivens v. Six Unknown Named Agents, 403 U.S. 386 (1971). Under the Federal Tort Claims Act, civil actions for damages arising from negligent or malicious conduct may be brought against the federal government in certain circumstances.

466. However, neither federal nor state law contains an absolute guaranteed right to obtain or recover compensation in every situation involving a miscarriage of justice. For example, U.S. law does not generally accord a right to compensation for an arrest or detention made in good faith but ultimately determined to have been unlawful. Thus, if upon review of a particular case, the U.S. Supreme Court were to adopt a new interpretation of a constitutional provision, which had the effect of retroactively invalidating an arrest which had been properly conducted under the rule previously in effect, no compensation would typically be owed to the subject of the arrest. Moreover, to the extent it has not been waived, the doctrine of sovereign immunity generally restricts opportunities for recovery of compensation against the government.

467. U.S. understanding. In view of the above, the United States included the following in its instrument of ratification:

> "The United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law."

Double jeopardy

468. The Fifth Amendment to the U.S. Constitution provides, among other protections: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb". The Double Jeopardy clause thus protects against reprosecution by the federal government for the same offence after a previous conviction or acquittal. It also protects against the imposition of multiple punishments for the same criminal act. See United States v. Halper, 490 U.S. 435 (1990). Because the Double Jeopardy clause of the Fifth Amendment applies to the states (Benton v. Maryland, 395 U.S. 784, 793-96 (1969)), a state may not prosecute persons more than once for the same crime.

469. The Double Jeopardy clause has been interpreted to bar successive prosecutions for greater- as well as lesser-included offences, Illinois v. Vitale, 447 U.S. 410, 421 (1980); United States v. Dixon, 113 S.Ct. 2849, 2861-62 (1993); Brown v. Ohio, 432 U.S. 161 (1977), and "when an issue of ultimate fact has once been determined by a valid and final judgment". When an issue of fact has been determined with finality in a prior trial, "that issue cannot again be litigated between the same parties in any future lawsuit". Ashe v. Swenson, 397 U.S. 436, 443 (1970).

470. The Double Jeopardy clause does not erect an absolute bar to successive prosecutions, however. For example, if circumstances occurring during the first trial require its termination for reasons unrelated to the sufficiency of the evidence and before a verdict has been issued, the Double Jeopardy clause will not protect against bringing the defendant again to trial. Richardson v. United States, 468 U.S. 317 (1984). Similarly, if the defendant appeals his conviction and prevails on appeal on an issue other than a claim that the evidence was insufficient, the Double Jeopardy clause does not bar the state from reprosecuting the defendant. Burks v. United States, 437 U.S. 1 (1978).

471. Additionally, because of the complexity of modern criminal laws, defendants may face more than one criminal charge arising from the same acts or series of acts. In an effort to simplify the analysis where there are either multiple punishments or multiple prosecutions, the Supreme Court has recently returned to a "same-elements" test: "whether each offence contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution". United States v. Dixon, 113 S.Ct. 2849, 2856 (1993), citing Blockburger v. United States, 284 U.S. 299, 304 (1932). Thus, where a person is charged with two different crimes, the doctrine of double jeopardy will not bar either sequential trials on the two charges or cumulative sentences as long as each count requires the government to prove a factual element that is not required in the other count. Nor will the Double Jeopardy clause bar separate and multiple prosecutions for the same crime by different sovereignties. Because federal and state jurisdiction are separate, the Supreme Court has interpreted the Double Jeopardy clause not to bar prosecutions by both the federal government and a state government, or by multiple state governments, for the same offence. See Heath v. Alabama, 474 U.S. 82 (1985); Abbate v. United States, 359 U.S. 187 (1959).

472. **Protections for defendants**. Notwithstanding that the U.S. Supreme Court has held that the Fifth Amendment does not bar those multiple prosecutions, the federal government imposes certain procedures to protect defendants in federal criminal cases. The U.S. Department of Justice's long-standing policy provides that "several offences arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions". Petite v. United States, 361 U.S. 529, 530 (1960) (per curiam).

473. The government's Petite policy is set out in the United States Attorney's Manual 9-2.142 (1988). Briefly, the policy states the presumption against prosecuting a defendant federally after he has been prosecuted either by state or federal authorities for "substantially the same act, acts or transaction unless there is a compelling federal interest supporting the dual or successive federal prosecution". In order to protect against overreaching prosecutions, the Assistant Attorney General of the Criminal Division must approve the initiation or continuation of the successive federal prosecution. The statement of policy spells out factors to be taken into account in making the Petite decision. First, "[a] federal prosecution will not be authorized unless the state/prior federal proceeding left substantial federal interests demonstrably unvindicated". Even then, the statement continues, the prosecution "normally will not be authorized unless an enhanced sentence in

the subsequent federal prosecution is anticipated". Other factors include: if the prior proceedings were "infect[ed] ... by incompetence, corruption, intimidation, or undue influence", or if the verdict represented "court or jury nullification involving an important federal interest, in blatant disregard of the evidence".

474. Many states have imposed more rigorous double jeopardy prohibitions against multiple prosecutions by different legal jurisdictions, either in statutes or their state constitutions. For example, New York State protects persons from reprosecution in state court for conduct that previously formed the basis for a federal prosecution. New York State's purpose in enacting its double jeopardy statute was "primarily to supersede the 'dual sovereignties' doctrine which permitted successive state and federal prosecutions based on the same transaction or conduct". People v. Rivera, 456 N.E.2d 492, 495 (N.Y. 1983).

475. U.S. understanding. As a result of these protective procedures and policies, multiple prosecutions occur only rarely. However, because it is permissible in certain narrowly defined situations and has on occasion proven an effective method for ensuring that those who violate others' basic rights are brought to justice, the United States included the following understanding in its instrument of ratification:

> "The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgement of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause."

Procedure in the case of juvenile persons

476. A separate system for juveniles, fundamentally different in theory and practice from adult criminal procedure, has been developed by the states. In addition, the federal court system follows the requirements set forth in 18 U.S.C. sections 5031-42 for juveniles addressed under the federal juvenile delinquency procedures. The federal statute mirrors state statutes in a number of ways and codifies various rights held by juveniles in any delinquency proceeding.

477. Juvenile delinquency proceedings are not, strictly speaking, criminal procedures. Juvenile proceedings take into account the age of the offenders and the desirability of promoting their rehabilitation, in part by avoiding the stigma of criminal arrest and conviction. See In re Gault, 387 U.S. 1, 15-16 (1966). Proceedings in juvenile court may be held for three reasons. A juvenile may be accused of an act that if committed by an adult would be a crime. Second, a juvenile may be involved in a proceeding where he or she is judged a person in need of supervision (PINS) for reasons such as truancy or being a runaway. Finally, juvenile court may be the setting for a child neglect case or a case involving cessation of parental rights.

478. The exact age limits for the juvenile justice system vary. In some four fifths of the states, persons are considered juveniles and are subject to juvenile proceedings up to age 18. The maximum age is 19 in one state and 16

or 17 in the remainder. Each state provides for waiver to adult criminal court depending upon the crime and sometimes the wishes of the juvenile.

479. Juvenile courts make a finding of delinquency. A juvenile may be found delinquent in a PINS case or where there is a "violation of a law of the United States committed by a person prior to his 18th birthday which would have been a crime if committed by an adult". 18 U.S.C. section 5031. For many years, one consequence of the difference in approach between criminal courts and juvenile courts was that juvenile proceedings did not afford the same procedural rights as are guaranteed by the Constitution in adult criminal proceedings. Beginning in the 1960s, however, courts in the United States extended constitutional guarantees to juvenile proceedings where punishments such as incarceration could result. Today, juveniles enjoy most of the same procedural guarantees as adults.

480. The U.S. Supreme Court in Gault found that the Constitution affords juveniles involved in delinquency proceedings (for criminal-type actions) the following: written notice of the charges in advance of the proceedings; assistance of counsel for the child with notice to the parents that this is the child's right and if the family cannot afford an attorney, one will be appointed by the court; protection from self-incrimination; and the right to confrontation of witnesses and cross-examination. Gault, 387 U.S. at 33, 36, 55, 56-7. The Court also has stated that a finding of delinquency must be based on proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Courts have found that the Fourth Amendment requirement for probable cause applies to pretrial detention hearings. Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976). The Supreme Court has noted, however, that where the state employs procedural safeguards such as a probable cause hearing, the legitimate state interests in preventive detention do not violate the Constitution. Schall v. Martin, 467 U.S. 253 (1984).

481. These and other protections for juveniles are codified in federal law at 18 U.S.C. sections 5031 to 5047 (notice-section 5034; counsel-section 5035; speedy trial-section 5036; dispositional hearing within 20 days-section 5037; privacy of juvenile delinquency records-section 5039; no juveniles in adult jails or correctional institutions-section 5039). Minors who are incarcerated are entitled to be segregated from adult inmates and to be accorded treatment appropriate for their age and legal status. 18 U.S.C. section 5035.

482. Although one quarter of the states provide for jury trials for juveniles, the U.S. Supreme Court has found that given the special aspects of juvenile proceedings, juveniles do not have a constitutional right to a jury in a delinquency proceeding. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

483. Confidentiality is one of the special aspects of juvenile proceedings. Juvenile proceedings are generally closed to the public and press. Most states provide for strict limitations on access to juvenile records or files.

484. Police provide the majority of referrals to juvenile court. Usually offenders are not detained beyond the need to complete the necessary processing and contact with the parents or guardians. Juveniles may be

detained in juvenile facilities if the juvenile has committed a serious offence and is considered a danger to the public. See 18 U.S.C. section 5035; Schall v. Martin, 467 U.S. 253 (1984).

485. The treatment of juvenile offenders by methods other than institutionalization generally is encouraged. These include counselling, rehabilitation, community service, and restitution. Such programmes are often employed in the case of less serious crimes such as theft. The federal government has supported the growth of such alternatives, with the passage of the Juvenile Justice and Delinquency Act of 1974. 42 U.S.C. sections 5601 et seq.

486. The design and operation of the juvenile justice system throughout the United States are subject to continuing re-examination. This results in part from the tension between the historic concept of delinquency proceedings as non-adversarial, akin to parental punishment, and the more recent determination that juveniles should enjoy the protections of adult criminal procedure. In addition, concerns about the quantity and severe quality of some "juvenile" crime have caused many to question whether the juvenile justice system, as presently conceived, is adequate or appropriate for certain serious offenders.

487. The increase in serious violent crime committed by juveniles in particular is cause for growing concern. According to U.S. Department of Justice statistics, juvenile arrests for violent offences increased 50 per cent in the five years between 1987 and 1991, with arrests for murder increasing by 85 per cent. Although those arrested for violent crime constitute only a small percentage of all juvenile arrests - only about 5 per cent - they constitute a significant portion of arrests for violent crime overall. In 1991, for example, juvenile arrests constituted some 17 per cent of all arrests for violent crime.

488. The juvenile system is not well designed to deal with particularly serious or "hard core" offenders. One approach to this problem in certain cases where a particularly serious crime has been committed or, in view of the juvenile's previous record, juvenile proceedings are no longer considered effective, is to remove such persons from the juvenile justice system to the adult criminal justice system.

489. The determination whether to treat a person within the statutory age category of "juveniles" as an adult is made by a juvenile transfer procedure in nearly all states. Under such a procedure, a judge decides after a hearing whether a transfer is in the best interests of the child and the public. Appeals are permitted. In some states, a prosecutor has discretion over whether to bring a case in criminal or juvenile court. Some state laws also provide for automatic prosecution in criminal court for serious offences, repeat offenders, or routine traffic citations. A juvenile who is subject to the adult criminal justice system is entitled to the constitutional and statutory rights and protections provided for adults and described in this report.

490. U.S. reservation. In view of the above, the United States conditioned its ratification of the Covenant on the following reservation:

> "The policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18."

Military justice system

491. The rules for the operation of military courts provide a similar range of protections to those afforded civilians, although with some exceptions. For example, Rule for Court-Martial (R.C.M.) 706, Manual for Courts-Martial (1984), mandates that courts-martial shall be open to the public, including members of both the military and civilian communities.

492. An accused is presumed innocent until proven guilty beyond a reasonable doubt. Under Rule for Court-Martial 910, if an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

493. Article 30 of the Uniform Code of Military Justice (UCMJ) requires that the accused be informed of the charges as soon as practicable (Section 830, Title 10, United States Code). Rule for Court-Martial (R.C.M.) 602 requires that charges which have been referred to trial be served upon the accused by the trial counsel and that, in time of peace, no person may, over objection, be brought to trial by general court-martial within a period of five days after service of charges, or before a special court-martial within three days after service of charges. The accused must be brought to trial within 120 days of referral of charges, imposition of restraint, or entry on active duty (R.C.M. 707).

494. The independence of military judges is of paramount importance to the military justice system. Federal law mandates that the military judge shall be a commissioned officer, and a member of the bar of a federal court or a member of the bar of the highest court of a state. 10 U.S.C. section 826. Neither the convening authority nor any member of the convening authority's staff may prepare or review the military judge's effectiveness report.

495. Rule for Court-Martial 104 prohibits unlawful command influence of the court-martial process and court personnel, including the military judge. No convening authority or commander may censure, reprimand, or admonish a military court or its personnel with respect to the findings or sentence adjudged or other exercise of the court proceedings or functions.

496. Under R.C.M. 804, the accused is required to be present at every stage of the trial proceedings, unless, after arraignment, the accused is voluntarily absent or his disruptive conduct causes the accused's removal or exclusion from the courtroom.

497. The accused has the right to be represented at a general or special court-martial or at a pretrial investigation by civilian counsel if provided by him, by detailed military counsel, or by military counsel of the accused's own choosing if that counsel is reasonably available. Military counsel are provided at no expense to the accused. 10 U.S.C. section 838.

498. The defence counsel has an opportunity to obtain witnesses and other evidence. The process to compel witnesses to appear and to testify and to compel the production of evidence is similar to that of other criminal courts in the United States. 10 U.S.C. section 846.

499. The military rules make provision for the employment of interpreters, when necessary, under R.C.M. 501 and 502. No person may be compelled to incriminate himself or herself or to answer any question the answer to which may tend to incriminate him or her. 10 U.S.C. section 831. Military Rule of Evidence 304 forbids the use of a statement obtained in violation of section 831, or evidence derived therefrom.

500. Cases involving a punitive discharge, dismissal of an officer, death, or confinement of one year or more are reviewed by the accused's service Court of Military Review, unless the accused waives such review. The Court of Military Review can correct any legal error it may find, and it can reduce an excessive sentence. The accused is assigned an appellate defence counsel at no cost before the Court of Military Review. The accused also may retain civilian counsel at the accused's expense to pursue an appeal. 10 U.S.C. section 866.

501. If the accused is not satisfied by the decision of the Court of Military Review, the accused may petition the U.S. Court of Military Appeals for further review. The Court of Military Appeals must review any sentence extending to death. That court consists of five civilian judges, and it can correct any legal error it may find. Counsel will be made available to assist in the petition to the Court of Military Appeals. 10 U.S.C. section 867.

502. Unless the accused waives review, special courts-martial not involving a punitive discharge or a sentence of confinement for one year or longer will be reviewed by a judge advocate. 10 U.S.C. section 864. In the case of a general court-martial, involving a similar sentence, the record shall be reviewed in the Office of The Judge Advocate General. 10 U.S.C. section 869.

503. Upon motion by the accused, a charge or specification will be dismissed if the accused has previously been tried by court-martial or federal civilian court for the same offence. Rule for Court-Martial 907.

504. Non-judicial punishment is permitted by article 15 of the UCMJ, 10 U.S.C. section 815, and governed by the Manual for Courts-Martial. This procedure permits commanders to dispose of certain offences without trial by court-martial unless the service member objects.

505. Service members first must be notified by their commanders of the nature of the charged offence, the evidence supporting the offence, and of the commander's intent to impose non-judicial punishment. The service members may then consult a defence counsel to determine whether or not to accept non-judicial punishment or demand trial by court-martial.

506. A member accepting non-judicial punishment may have a hearing with the commander. Th member may have a representative at the hearing, may request that witnesses appear and testify on behalf of the member, and may present other evidence. The commander must consider any information offered during that hearing and must be convinced of guilt by reliable evidence before imposing punishment.

507. Members who wish to contest their commander's determination of guilt or the severity of the punishment imposed may appeal to the next higher commander. The appeal authority may set aside the punishment, decrease its severity, or deny the appeal. Non-judicial punishment does not constitute a criminal conviction.

Article 15 - Prohibition of ex post facto laws

508. The U.S. Constitution forbids both the federal government and states from enacting ex post facto laws. Article I, section 9 of the Constitution, addressing the duties of the U.S. Congress, states that "No ... ex post facto Law shall be passed". Article I section 10 provides that "No State shall ... pass any ... ex post facto Law". An ex post facto law would retroactively make unlawful conduct that was lawful when it was committed or would increase criminal penalties retroactively. The prohibition on ex post facto laws applies to Congress and the states. See Calder v. Bull, 3 U.S. (3 Dall.) 386 (1789); Dobbert v. Florida, 432 U.S. 282, 292-94 (1977); Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 2719 (1990).

509. These constitutional provisions preclude the retroactive application of a penal statute where the statute would, after the fact, make criminally punishable an act that was legal when done. The prohibition against ex post facto legislation also forbids the State from imposing a higher penalty for a criminal act than was available at the time the crime occurred. This prohibition has been relied on to invalidate application of a statutory change that would have made mandatory a maximum penalty that was not required at the time the crime was committed, Lindsey v. Washington, 301 U.S. 397 (1937), or that would have imposed a higher "guideline" sentence for the underlying criminal conduct than was in force at the time the crime was committed, Miller v. Florida, 482 U.S. 423 (1987), or that would eliminate prison credit for good behaviour, Weaver v. Graham, 450 U.S. 24 (1981). The U.S. Supreme Court also has invalidated the retroactive application of certain procedural changes, such as a law requiring fewer jurors in a state criminal trial, under the ex post facto clause. Thompson v. Utah, 170 U.S. 343 (1898). The ex post facto clause bars the application of an extended statute of limitations after the period under the original statute of limitations had run.

510. At the same time, however, other matters may be subject to retroactive amendment. Changes in trial or post trial procedures or in the rules governing admission of evidence, for example, may apply to prosecutions for offences that occur before the statutory or rule changes; retroactive application does not trigger ex post facto concerns. E.g. Collins v. Youngblood, supra (change in procedure allowing reformation of an improper

jury verdict); Splawn v. California, 431 U.S. 595 (1977) (change in jury instructions); Thompson v. Missouri, 171 U.S. 380 (1898) (change in evidentiary rules).

511. While the Constitution thus prohibits imposition of punishment upon an offender that was statutorily unavailable at the time he committed the offence, the Constitution does not require that offenders benefit from less onerous laws passed after the commission of the crime. As the Supreme Court explained, "for a law to be ex post facto it must be more onerous than the prior law". Dobbert v. Florida, 432 U.S. 282, 294 (1977). In other words, new laws that are less onerous do not raise ex post facto concerns. State and federal courts permit the retroactive application of more lenient statutes but do not require it. For example, when the Federal Sentencing Commission lowers a sentencing range, that change is not automatically applicable to those defendants previously sentenced under the earlier, higher range. The sentencing court may reduce the sentence "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. section 3582(c)(2).

512. U.S. reservation. Because of the contrast between article 15, paragraph 1, clause 3 - which requires post offence reductions in penalty to accrue to the offender's benefit - and U.S. laws, which do not necessarily give an offender the benefit of subsequent reductions of penalty, the United States conditioned its ratification of the Covenant upon the following reservation to paragraph 1 of article 15:

> "As U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15."

Article 16 - Recognition as a person under the law

513. All human beings within the jurisdiction of the United States are recognized as persons before the law. Slavery and involuntary servitude were outlawed in 1865 by the Thirteenth Amendment to the U.S. Constitution, as discussed in greater detail under article 8. Aliens are granted basic constitutional rights and entitled to the protection of the courts, as discussed under articles 2 and 13.

514. The common law doctrine of civil death, which provided that a convicted felon was deprived of legal personality and could not perform legal functions such as entering into contracts, does not exist today, although prisoners sometimes are not permitted to vote (see discussion under article 25). Federal and state prisoners enjoy a constitutional right of access to the courts. See McCrary v. Maryland, 456 F.2d 1 (4th Cir. 1972); McCuiston v. Wanicka, 483 So.2d 489 (Fla. Ct. App. 1986). Prisoners frequently file actions in the federal courts seeking writs of habeas corpus and suing governmental authorities for alleged violations of their civil rights under 42 U.S.C. section 1983.

Article 17 - Freedom from arbitrary interference with privacy, family, home

515. **Right to privacy**. The freedom from arbitrary and unlawful interference with privacy is protected under the Fourth Amendment to the Constitution. As explained previously, the Fourth Amendment protects persons from unlawful searches and seizures by the Government at both state and federal levels. The U.S. Supreme Court has defined search under the Fourth Amendment to be a government infringement of a person's privacy. Rakas v. Illinois, 439 U.S. 128, 140-49 (1978). An infringement of that privacy occurs when the individual exhibits an actual subjective expectation of privacy and when that expectation is one that society is prepared to deem reasonable. Katz v. United States, 389 U.S. 347 (1967). Put another way, the reasonable expectation of privacy is the linchpin of the Fourth Amendment.

516. Under that analysis, persons have no subjective or reasonable privacy interest in property that they have abandoned, Hester v. United States, 265 U.S. 57 (1924), or in items that they expose to the public, such as contraband lying in plain view. Coolidge v. New Hampshire, 403 U.S. 443 (1971). They do, however, have a privacy interest in such areas as their homes, cars and correspondence.

517. Although the literal language of the Fourth Amendment does not require a warrant for searches and seizures, the U.S. Supreme Court interprets the Fourth Amendment to mandate a warrant (absent exceptions, like exigency, that are inapplicable here) where the intrusion might compromise a "reasonable expectation of privacy". Katz v. United States, 389 U.S. 347 (1967). Conversely, where the individual has no reasonable expectation that his conduct or possessions will be private, there is no requirement that government agents first secure a warrant. "What a person knowingly exposes to the public, even in her own home or office, is not a subject of Fourth Amendment protection". Katz v. United States, 389 U.S. at 351.

518. Where there exists a reasonable expectation of privacy, the Constitution does not permit government violation of that reasonable expectation without probable cause to believe that a crime is occurring or that evidence of crime will be found. The Supreme Court has imposed a presumption that government officials will first secure a warrant. When officers seek a warrant, they must make a showing of probable cause before a neutral and detached official. This official need not, however, be a judge or a magistrate; the primary requirement is that he be neutral and detached, i.e. not an agent or arm of the police department. Shadwick v. City of Tampa, 407 U.S. 345, 348-50 (1972).

519. **Exclusionary rule**. If officers do not first obtain a warrant they must have good justification for the warrantless action; in addition, the government's decision to search or seize property must have been accompanied by probable cause. If a judge later determines that the search was not supported by probable cause, or that the officers did not have sufficient reason to forego seeking a prior warrant - i.e. that the search was illegally conducted and evidence illegally seized - the court may exclude that evidence, and any further evidence and leads from it, at the criminal trial. This rule of suppression is known as the exclusionary rule. See Weeks v. United States, 232 U.S. 383 (1914) (requiring suppression and exclusion from trial of

evidence seized in violation of Fourth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (applying exclusionary rule to items seized by state officers and offered into evidence at state prosecution). Where the search and seizure is supported by an underlying facially valid warrant issued by a proper official upon his or her satisfaction with the sufficiency of probable cause, even if there is some defect in the process the courts will apply a good faith exception to the exclusionary rule. United States v. Leon, 468 U.S. 897 (1984).

520. Family. United States law has long recognized the right of families to privacy. The scope of this privacy right has changed considerably over time and remains a source of significant controversy. Early in the nation's history, for example, family privacy prevented prosecution of abusive husbands, forbade spouses from testifying against each other, limited the availability of divorce, and even allowed women to sue men for broken promises to marry. More recently, the Supreme Court has relied upon the concept to define and protect important individual rights within the family.

521. In the landmark case of Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court found a "marital privacy" right to use contraception within the "sacred precincts of marital bedrooms". This right was founded upon the "penumbra" of privacy created by the Bill of Rights. In subsequent decisions, the Supreme Court has relied upon the same concepts in finding the right of unmarried individuals to obtain contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972), of women to obtain abortions, Roe v. Wade, 410 U.S. 113 (1973), and of a grandmother to live with her grandchildren despite zoning ordinances, Moore v. City of Cleveland, 431 U.S. 494 (1977). In California, the concept has been applied to permit unmarried individuals to sue each other for support ("palimony") at the end of an intimate relationship. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 103 (1976).

522. The right of families to privacy, in particular from governmental intrusion, is not unconditional, however, and may be limited to traditional American concepts of family. In one of the most controversial cases recently to consider the extent of this right, the Supreme Court upheld the constitutionality of a Georgia statute criminalizing sodomy. Bowers v. Hardwick, 478 U.S. 186 (1986). In its decision, the Court declined to find a correlation between the rights to found a family and to procreate, on the one hand, and the asserted right of homosexual persons to engage in acts of sodomy. The Court has also indicated that family privacy will not prevent governmental actions where that action will assist one family member as against another, for example by sending social welfare workers to the homes of welfare recipients without prior announcement to ensure the well-being of a child, Wyman v. James, 400 U.S. 309 (1971), and in permitting a woman to waive her privilege regarding testifying against a spouse in order to limit her own criminal liability, Trammel v. United States, 445 U.S. 40 (1980).

523. Several recent cases have underscored the continuing effort to define the family and to determine how rights may be allocated among family members. For example, during 1993, a child was permitted to "divorce" her natural parents in favour of the unrelated man who had unwittingly raised her as his own child (the "Baby Sway" case). Another couple was awarded custody of their natural child after the mother had previously offered the child for adoption and after

the child had lived with the adoptive parents for more than two years (the "Baby Jessica" case). One state court refused to allow a natural mother to retain custody of her child because the mother was a lesbian (the "Little Tyler" case). These cases indicate that the courts - and Americans as a society - continue to struggle with these important issues and how the parameters of family privacy and familial rights continues to evolve.

524. **Home**. As noted above, the Fourth Amendment protects persons from unlawful government searches and seizures within their home or property. Of these interests, the Constitution is particularly protective of the sanctity and privacy of the home. E.g. United States v. Orito, 413 U.S. 139, 142 (1973) (the "Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education"); Payton v. New York, 445 U.S. 573, 601 (1980) ("the sanctity of the home ... has been embedded in our traditions since the origins of the Republic"); Id. at 590. As one law professor and commentator on the Constitution explained, "[t]he home not only protects us from government surveillance, but also 'provide[s] the setting for those intimate activities that the fourth amendment is intended to shelter from government interference'". Laurence H. Tribe, American Constitutional Law 1413 (2d ed. 1988), quoting Oliver v. United States, 466 U.S. 170, 179 (1984).

525. **Correspondence**. The right to privacy in one's correspondence is also recognized under the Fourth Amendment. The government may not open a person's mail without a warrant issued by a judicial officer based on probable cause.

526. There is an exception to that rule for mail entering the United States from abroad. In United States v. Ramsey, 431 U.S. 606 (1977), the Supreme Court applied a historic border exception to the general inviolability of personal correspondence and held that the government may search mail entering the United States based on its longstanding right to self-protection by stopping and examining persons and property crossing borders into the country.

527. **Technology: movements and conversations: electronic surveillance**. The U.S. Congress has also recognized that there could be substantial privacy infringements through the use of electronic devices to track the movements of persons or things and to intercept private communications. Such devices include wiretaps, pen registers and trap and trace devices (which record telephone numbers called from a particular phone and the numbers of telephones from which calls are made to a particular phone, respectively), digital "clone" pagers, beepers, and surreptitiously installed microphones.

528. Consequently, in 1968 Congress enacted a statute, which has subsequently been modified to accommodate technological advances, to regulate the use of electronic audio surveillance and interception. 18 U.S.C. sections 2510-21 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968 - Wiretapping and Electronic Surveillance, Pub. L. No. 90-351, 82 Stat. 212.) The statute essentially bans the use of certain electronic surveillance techniques by private citizens. It makes punishable as a felony any intentional interception of any wire, oral, or electronic communication that

would not be otherwise readily accessible to the public; use of an interception device; or disclosure of the contents of any communication that has been unlawfully intercepted. 18 U.S.C. section 2511.

529. However, law enforcement officials are exempted from the prohibition under certain explicit conditions. The primary condition is that the government agent obtain a court order before it may utilize many types of electronic surveillance, such as wiretaps and pen registers.

530. Having obtained approval, the agent must then apply for an order from a federal court. The application must set forth sufficient facts to satisfy the court that probable cause exists to believe that (i) certain identified persons have committed, are committing, or will commit one of the specific serious felony offences covered by the statute; (ii) all or some of the persons have used, are using, or will use a targeted communication facility or premises in connection with the commission of the listed offence; and (iii) the targeted communication facility or premise has been used, is being used, or will be used in connection with the crime. The agent's application must also satisfy the judge that other less intrusive investigative procedures have been tried without success, would not be likely to succeed, or would be too dangerous to use. The application must also include a complete statement of all other applications that have been made for electronic surveillance involving the persons, facilities, or premises.

531. The interception order is valid for no longer than 30 days but can be extended repeatedly. In granting the extension request the court may require progress reports on the past surveillance and need for continuing surveillance. In addition, the judge issuing the order and the Department of Justice are required to make reports to the Administrative Office of U.S. Courts on each court-ordered electronic surveillance and the number of arrests, suppression orders, and convictions that resulted from them. 18 U.S.C. section 2519.

532. There is an exception to the requirement of prior judicial approval where there is an emergency involving immediate danger of death or serious bodily injury to any person or where conspiratorial activities threaten national security interests or are characteristic of organized crime. When electronic surveillance is utilized in these emergency instances, the government must obtain a court order within 48 hours.

533. During the period of surveillance the agents are under a continuing duty to minimize - that is, to not record or overhear conversations that are not related to the crimes or persons for which the surveillance order was obtained. The recordings must also be sealed in a manner that will protect them from public disclosure.

534. The 1968 statute predated the use of video surveillance and was passed in the wake of two Supreme Court decisions that addressed non-consensual interception of oral communications. Moreover, in 1968 video cameras were too bulky and too noisy to be effective as surreptitious recording devices, and thus were not considered when the electronic surveillance statute was enacted. For both these reasons, the statute did not address the use of electronic video interception for gathering evidence. However, the federal appellate

courts that have considered the issue all agree that the government may conduct surveillance by use of videotape interception as well as by intercepting wire, oral, and electronic communications. Because the statute governing electronic and wire communications does not apply to videotape surveillance, the courts analyse the question under the Constitution alone and permit its use if it is done consistent with the requirements of the Fourth Amendment. United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992) (en banc); United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir. 1990); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987); United States v. Biasucci, 786 F.2d 504 (2d Cir. 1985), cert. denied, 479 U.S. 827 (1986); United States v. Torres, 751 F.2d 875 (7th Cir. 1984), cert. denied, 470 U.S. 1087 (1985).

535. The federal wiretap statute does not forbid the warrantless use of eavesdropping equipment to record or transmit what the suspect says to a person acting unbeknownst to him as an agent of the government when that person has given prior consent to the interception. 18 U.S.C. section 2511(2)(c) provides:

> "It shall not be unlawful under this chapter for a person acting under colour of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to the interception."

Similarly, the Fourth Amendment's protection of one's reasonable expectations of privacy does not require that the government obtain a warrant for a consensual interception, i.e. where one of the parties consents. In a case where a secret agent wore a recording device concealed on his person, the Supreme Court explained:

> "[The] case involves no 'eavesdropping' whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of [the suspect's] premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with [the suspect's] assent, and it neither saw nor heard more than the agent himself." Lopez v. United States, 373 U.S. 427, 439 (1963).

536. Though federal judges need not authorize interception orders where one party to the conversation has consented to the electronic eavesdropping, the U.S. Department of Justice has adopted certain written guidelines for federal prosecutors. These guidelines are set forth in the Attorney General's Memorandum of 7 November 1983, which states:

> "When a communicating party consents to the interception of his or her verbal communications, the device may be concealed on his or her person, in personal effects, or in a fixed location. Each

department and agency engaging in such consensual interceptions must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party." See United States v. Padilla, 520 F.2d 526 (1st Cir. 1975).

537. The same rule applies to consensual videotaping. An expert on U.S. Fourth Amendment law has explained that the reasoning offered with respect to the use of eavesdropping-wiretapping equipment "is generally true as well as to electronic visual surveillance. It is no search to videotape what a police officer is observing in a plain view situation, nor is any justified expectation of privacy violated by the videotaping of activity occurring in full public view. By analogy ... it has also been held that Fourth Amendment protections do not extend to the videotaping of 'private' activities between the defendant and another when the other party has consented to the taping". Wayne R. LaFave, Search and Seizure: A Treatise On The Fourth Amendment, Vol. 1, section 2.2(e), at 365 (2d ed. 1987).

538. Also by analogy, persons can have no reasonable expectation of privacy under the Fourth Amendment that their presence and physical appearance, which is constantly exposed to the public, will be "private". United States v. Dionisio, 410 U.S. 1 (1973) (the Fourth Amendment does not require a warrant before the government may demand voice exemplars because "the physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public" so that "no person can have a reasonable expectation that others will not know the sound of his voice"). Warrantless visual surveillance does not implicate the Fourth Amendment, even when that surveillance is accompanied by the taking of photographs or the use of videotape equipment. United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972); United States v. Knotts, 460 U.S. 276, 280-86 (1983) (warrantless visual surveillance of the defendants in the course of monitoring a beeper placed with consent of the owner in a transported container does not violate the Fourth Amendment).

539. Another area of note regarding technology and privacy is individuals' privacy with respect to information maintained on computer databases. In general, individuals are entitled to privacy by the Privacy Act, 5 U.S.C. section 552a. The Privacy Act generally bars federal agencies from using information collected for one purpose for a different purpose. The Computer Matching and Privacy Protection Act of 1988 specifically addresses the use by federal agencies of computer data. The Act regulates the computer matching of federal data for federal benefits eligibility or recouping delinquent debts. The government may not take adverse action based on such computer checks without giving individuals an opportunity to respond. Three other federal laws that protect information commonly maintained on computer database are the Fair Credit Reporting Act (15 U.S.C. sections 1681-81t), the Video Privacy Protection Act (18 U.S.C. section 2710), and the Right to Financial Privacy Act (12 U.S.C. section 3401). The first regulates the distribution and use of credit information by credit agencies. The second prevents the disclosure and

sale of customers' video-rental records without the customers' consent. The last sets procedures regarding when federal agencies may review customers' bank records.

540. None the less, certain facts about individuals are matters of public record such as date of birth, fact of marriage, military record, licences, or court pleadings. There is no liability for release of such information. The majority of courts have found that maintenance and release of databases on an exonerated arrestee's criminal record is not a privacy violation.

541. **Unlawful attacks on honour or reputation**. While U.S. law, primarily civil law, protects an individual from false and defamatory attacks on his reputation, this protection is tempered by the fundamental right, embodied in the First Amendment, of people to speak and write without fear of civil or criminal liability. The First Amendment right of free speech significantly shields persons engaged in critical, even derogatory speech, particularly where that speech concerns a "public person", i.e. a public official, candidate for public office, or other person known by the public because of the incident in question.

542. The First Amendment right of free speech does not protect persons who engage in libel, defamation, or slander from liability. Claims for libel or slander may be pursued under state law, typically in a civil suit for damages. A few states have criminal libel laws. For instance, Massachusetts imposes criminal liability for material intended to maliciously promote hatred through libel of groups of persons because of race, colour, or religion. See Mass. Ann. Laws ch. 272 section 98(C). Alabama maintains a criminal libel statute based upon material tending to provoke a breach of peace, the traditional standard before several states repealed their criminal libel and slander laws. See Ala. Code section 13A-11-160 (1993). California, by contrast, has repealed its criminal slander code provisions. Cal. [Penal] Code sections 258-60, repealed 1991 (West 1993).

543. Communication is defamatory where it tends or is reasonably calculated to cause harm to another's reputation. The harm may be to the person's personal or business reputation. Language is defamatory if it tends to expose another to hatred, shame, contempt, or ostracism in his community. Criminal defamation may be claimed where the defamation was made with malicious intent. Both civil and criminal claims are limited by certain privileges. Where a privilege exists, the claimant must show the defamatory communication is false and was made with actual "malice". Public persons, for example, may only assert a claim based on criticism of their official conduct where the tests of falsity and actual malice have been met. New York Times v. Sullivan, 376 U.S. 254 (1964) (civil liability limited). Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal liability limited). "Malice" in this context has been defined to mean "with actual knowledge of the falsity or reckless disregard as to whether [a statement] is true or false". Id In this instance, the constitutional right to free speech and corresponding principle of free and open debate limits the ability of public officials to make a civil or criminal claim of defamation.

544. Other privileges apply to statements made in the context of religious and church matters, expulsion and disciplinary proceedings, and fiduciary and

professional communications. The U.S. Constitution provides an absolute privilege to members of Congress for statements made in the performance of their legislative duties. U.S. Const. art. I, section 6. A similar privilege may be applied to judicial proceedings and proceedings of state and local legislative bodies.

Article 18 - Freedom of thought, conscience, and religion

545. Early immigrants to the United States came to the New World to practise their respective religions free from governmental persecution. Freedom of religion, and the related freedoms of thought and conscience, are consequently among the most fundamental and carefully guarded building blocks of American judicial and political theory.

546. The First Amendment to the U.S. Constitution includes a guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The First Amendment is made applicable to state and local governments by the Fourteenth Amendment to the Constitution. Cantwell v. Connecticut, 310 U.S. 296 (1940). As discussed below, U.S. law takes a broad view of what constitutes "religion" for purposes of these protections. The right to freedom of "thought" and "conscience" is thus in many circumstances subsumed within freedom of "religion". To the extent it is not, the right to freedom of thought and conscience is protected by the First Amendment guarantees of freedom of speech and opinion, as discussed under article 19.

547. Federal, state and local laws and practices may be challenged in the federal courts as violating either the Establishment clause or the Free Exercise clause of the First Amendment. In consequence, governmental approval may not be required for religious activities and practices, and the scope of governmental regulation is extremely limited. The separation of church and state has also been preserved by the judicial doctrine that, when there is a dispute within a religious order or organization, courts will not inquire into religious doctrine, but will defer to the decision-making body recognized by the church and give effect to whatever decision is officially and properly made. For example, in Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), the U.S. Supreme Court struck down a state statute that purported to "recognize" the autonomy of North American branches of the Russian Orthodox from the "mother" church. Disputes over church property, the Court held, must respect the church's own structure (hierarchical, congregational, etc.).

548. **Free exercise.** People in the United States have broad freedom to practise their religions. Government restrictions on the exercise of religion have been permitted only to the extent that those restrictions are embodied in neutral laws designed to protect public health and welfare, or where religious practices otherwise pose a substantial threat to public safety.

549. The earliest Free Exercise cases upheld various attempts to restrict the Mormons' practice of polygamy. See e.g. Reynolds v. United States, 98 U.S. 145 (1879) (prosecution for bigamy); Murphy v. Ramsey, 114 U.S. 15 (1885) (federal statute barring polygamists from voting or serving on juries); Davis v. Beason, 133 U.S. 333 (1890) (territorial legislation requiring prospective voter to swear not to be a polygamist and not a member of any organization

encouraging or practising polygamy); The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (revocation of charter of Mormon Church and confiscation of church property). See also Cleveland v. United States, 329 U.S. 14 (1946) (transporting a plural wife across state lines violates Mann Act).

550. In a later case, Amish parents challenged a law requiring compulsory education to age 16, arguing that their children were being exposed to worldly influences contrary to Amish beliefs and way of life. Wisconsin v. Yoder, 406 U.S. 205 (1972). The Supreme Court ruled in favour of the Amish, allowing them to take their children out of school a few years early. The Court found that the law of compulsory education significantly interfered with the children's religious development in violation of the Free Exercise clause. The state's interest in educating its citizenry was not found to be so compelling as to override the interests of the Amish, and cutting short their education by a few years was not seen to cause harm to either the children or society in general. The Court described prior case law as establishing "a charter of the rights of parents to direct the religious upbringing of their children". Id. at 233.

551. The Court has also ruled that unemployment compensation may not be denied to a beneficiary who is unwilling to accept employment that would require working on his or her sabbath. Sherbert v. Verner, 374 U.S. 398 (1963); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987). Further, the beneficiary may not be denied benefits where his or her belief is a sincere religious one, but not based on the tenets or dogma of an established religious sect. Frazee v. Illinois Department of Employment, 489 U.S. 829 (1989). Recently, the Court struck down a local ordinance punishing animal cruelty, including animal sacrifice not intended primarily for food consumption, on the grounds that the ordinance had both the purpose and effect of restricting religious conduct, and did not reach other conduct producing the same type of harm. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1993).

552. The Sherbert and Yoder cases, supra, suggest that a law which substantially burdens the exercise of religion will be subjected to strict judicial scrutiny and will be upheld only if it is neutral, it furthers a compelling state interest and is the least burdensome means of furthering that interest. In another line of cases, however, the Court has upheld certain neutral laws of general applicability without applying strict scrutiny. For example, the Court upheld the validity of compulsory vaccination laws despite religious proscriptions against medical care. Jacobson v. Massachusetts, 197 U.S. 11 (1905). The Court has also ruled that the Free Exercise clause does not mandate an exemption from Sunday closing laws for Orthodox Jewish merchants who observe Saturday as the sabbath and are therefore required to be closed two days of the week rather than one, Braunfield v. Brown, 366 U.S. 599 (1961). Indeed, the Court has ruled that a state statute providing sabbath observers with an absolute and unqualified right not to work on the sabbath, taking no account of the needs of the employer or of non-observant employees, violates the Establishment clause. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). Further, the Court has upheld the application of federal tax laws to an Amish farmer who refused to pay on religious grounds. United States v. Lee, 455 U.S. 252 (1982). Most recently, the Court has

re-examined the level of scrutiny to be applied in certain Free Exercise cases. In Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Court explicitly held that neutral laws of general applicability are not subject to strict judicial scrutiny and found that state drug laws may be applied to bar the sacramental ingestion of controlled substances such as peyote.

553. Reacting adversely to the Smith decision, the U.S. Congress enacted the Religious Freedom Restoration Act of 1993 (Pub. L. No. 103-141, 107 Stat. 1488). The stated purpose of the Act was to restore the compelling interest test as set forth in Verner and Yoder, supra. The Act provides that the government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. It remains to be seen precisely what effect the statute will have on free exercise cases, but it is already being invoked in a number of prisoners' rights cases. See e.g., Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994); Allah v. Menei, 844 F. Supp. 1056 (E.D. Pa. 1994).

554. The Supreme Court has for the most part avoided addressing the delicate question of what constitutes a religious belief or practice. However, the Court has noted that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has an important interest". Wisconsin v. Yoder, supra, at 215-16. The Court has speculated that some beliefs may be "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the free exercise clause". Thomas v. Review Board, Indiana Employment Security Div., 450 U.S. 707, 715 (1981). In identifying such "non-religious" beliefs, the Court has focused on the credibility and sincerity of an individual's beliefs, rather than on the orthodoxy or popularity of a particular faith. Thus, the Court has held that a state could not make membership in an organized church, sect, or denomination a prerequisite for claiming a religious exemption to an unemployment insurance statute requirement that claimants be able to work on all days of the week. Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989).

555. Charitable status for taxation and solicitation. A further government accommodation of the free exercise of religion is through the tax code. A religious organization can qualify for exemption from federal income tax and be eligible to receive tax-deductible contributions if it meets the requirements under the Internal Revenue Code, 26 U.S.C. section 501(c)(3) and 26 U.S.C. section 170. Failure to meet the Code requirements does not affect an organization's legal right to operate. Rather, it merely means it is subject to income tax on its net income and that donors may not claim charitable tax deductions for the value of gifts to the organization.

556. Section 501(c)(3) of the Internal Revenue Code provides that an organization will qualify for exemption from federal income tax if it is organized and operated exclusively for religious, charitable, or educational purposes, if no part of its net earnings inures to the benefit of any private shareholder or individual, if no substantial part of its activities is carrying on propaganda, or otherwise attempting to influence legislation, and

if it does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. The prohibition on the inurement of earnings to private individuals is intended to ensure that an exempt organization serves the public good, and to prevent it from conferring financial benefits (other than reasonable compensation) on persons with a personal or private interest in its activities. Inurement can take many forms, including the payment of dividends or unreasonable compensation. The issue of inurement most often arises in religious organizations where the entity is controlled by one person or a very small group of persons. Similar requirements are contained in section 170(c)(2) concerning eligibility to receive deductible contributions.

557. The Internal Revenue Code does not define the term "religious" for purposes of section 501(c)(3). Internal Revenue Service determinations concerning the tax-exempt status of religious organizations do not involve judgement of the merits of a claimed religious belief. Rather, the Service looks to whether the asserted religious beliefs of the organization are truly and sincerely held, and whether the practices and rituals (as opposed to beliefs) associated with the organization's religious belief or creed are not illegal or contrary to clearly defined public policy. A religious organization may also serve other exempt purposes under section 501(c)(3). For example, it may also be charitable or educational. These could serve as independent bases for qualification for exemption, assuming the organization satisfies the other requirements of section 501(c)(3).

558. State tax laws also exempt religious and charitable organizations from state income taxes. In addition, though the states vary in the degree to which they regulate charitable organizations, state laws governing charitable organizations generally exempt religious organizations from whatever requirements they do impose.

559. Religious organizations are also generally exempt from state laws regulating charitable solicitations by charitable organizations. For example, both Executive Law section 172-a, Book 18, McKinney's Consolidated Laws of New York, and section 45:17A-5(a) of New Jersey Revised Statutes, which concern the solicitation and collection of funds for charitable purposes, specifically exclude religious corporations and other religious agencies and organizations, and charities, agencies, and organizations operated, supervised, or controlled by or in connection with a religious organization. When a state does attempt to regulate the activities of a religious organization, it must not do so in a manner that violates the rights guaranteed by the First Amendment to the U.S. Constitution. A Minnesota statute that limited exemption from registration only to those religious organizations that received more than half their support from members was found by the Supreme Court to violate the First Amendment in Larson v. Valente, 456 U.S. 228 (1982). The Court concluded the law had the effect of preferring some religions over others, thus violating the Establishment clause.

560. **Remedies**. As discussed under article 2, federal statutes make it a crime for a person acting "under color of law" to deprive another person of any right protected by the Constitution or laws of the United States. 18 U.S.C.

section 242. A parallel civil statute, 42 U.S.C. section 1983, authorizes a civil action by the victim to recover damages. It is also a crime for two or more persons to conspire to injure or intimidate another person in the free exercise of any such right, or because that person has exercised such a right, 18 U.S.C. section 241; and for any person, "under color of law", by force or threat of force, to injure, intimidate or interfere with another person because of that person's race, colour, national origin or religion, because that person is attending public school, applying for employment, or engaged in other such protected activities. 18 U.S.C. section 245.

561. In addition to these criminal civil rights provisions, a recently enacted federal statute explicitly makes it a crime for a person intentionally to deface, damage, or destroy any religious real property because of its religious character, or intentionally to obstruct, by force or threat of force, another person's free exercise of religious beliefs. 18 U.S.C. section 247.

562. Federal civil rights statutes prohibit discrimination on the basis of religion (along with such other factors as race, sex, and national origin). For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e et seq., bars discriminatory employment practices. However, an exception is made for religious institutions to allow them to employ people of a particular religious background if their work is related to the employer's religious activities. Title VII also requires an employer to make "reasonable accommodation" of an employee's religious practices if it is possible to do so without imposing undue hardship on the conduct of business. 42 U.S.C. section 2000e(j). The case law on what constitutes a reasonable accommodation resembles the case law regarding the free exercise of religion.

563. **Establishment**. The Establishment clause of the First Amendment promotes religious freedom by limiting the influence of federal and state governments on religious thought and practice. The U.S. Supreme Court has often described its method of assessing whether a government practice violates the Establishment clause as follows: the statute must have a secular non-religious purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and the statute must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971). The appropriateness of this precise standard, and the nuances of its application, are often subject to dispute. But there is common agreement that the clause clearly forbids either a state or the federal government from setting up a church. As the U.S. Supreme Court has clearly stated:

> "Neither [federal nor state governments] can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against this will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the

> Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

564. The recurring areas of controversy involving application of the Establishment clause fall into three general areas. The first involves public aid to religion, such as the indirect provision of government benefits to private parochial schools. Such issues involve reconciling the interest of government in permitting parents and legal guardians "to ensure the religious and moral education of their children in conformity with their own convictions" by permitting the provision of benefits to such education in a like manner as to secular education, while avoiding government entanglement with such practices. In a recent case, Zobrest v. Catalina Foothills School Dist., 113 S.Ct. 2462 (1993), the U.S. Supreme Court emphasized that the Establishment clause does not prevent religious institutions from participating in government programmes that neutrally provide benefits to a broad class of citizens, such as tax deductions for educational expenses or vocational assistance programmes, and upheld the provision of government-paid interpreters to deaf children attending sectarian as well as public schools. The Court distinguished the direct provision of aid to religious schools from aid to handicapped children attending those schools, as well as public involvement with other personnel - such as teachers or guidance counsellors - who might have a more profound role in the education of the children. Most recently, the Court struck down a New York statute carving out a special education school district for Orthodox Jewish children on the grounds that the statute impermissibly advanced religion. Board of Education of Kyras Joel Village School District v. Grumet, 62 U.S.L.W. 4665 (27 June 1994).

565. A second category of cases involves the recognition and practice of religion in public schools, in particular the question of school prayer. These cases ultimately involve the degree to which the government will foster or permit religious practices in public institutions. The courts have been particularly careful to protect schoolchildren from any coercive exposure to religious exercises. For example, in Engel v. Vitale, 370 U.S. 421 (1962), a school board had adopted a directive which required a specific prayer to be said aloud in each classroom at the start of every school day. The Court declared the directive unconstitutional even though the prayer was denominationally neutral and even though children could be excused from participating. The Court noted that the Establishment clause does not merely forbid direct government compulsion, but also extends to prohibit any law establishing or respecting an official religion, regardless of whether non-observing individuals are directly coerced. The Court noted that there is substantial indirect coercive pressure where the power, prestige, and financial support of the government is placed behind a particular religious belief.

566. The Court recently reaffirmed this principle in Lee v. Weisman, 112 S.Ct. 2649 (1992). When a public middle school arranged to have members of the clergy read an invocation and benediction at their graduation ceremonies, the Court held the Establishment clause was violated because even non-sectarian invocations and benedictions in public school graduations create an identification of governmental power with religious practice, thereby

endorsing religion. The Court focused on the element of coercion, particularly "for the dissenter of high school age, who has a reasonable perception that she is being forced by the state to pray in a manner her conscience will not allow".

567. This is not to say that parents may not choose to provide religious education for their children as part of a school curriculum. The tens of thousands of privately owned and operated religious schools around the country are free to mingle religion and education as much as they wish. Religious institutions are also free to provide religious education separately from a regular school curriculum, and parents are of course free to provide religious education of their choice through religious schools, separate religious education programmes, or at home. It is towards public schools, operated with public funds, that the Establishment clause is directed. Public schools may teach religion for its historical or literary qualities, but may never preach it as such.

568. One of the most difficult issues to face the Supreme Court, almost every term, is the issue of governmental financial assistance that may inure to the benefit of religious schools. At one time, it was possible to discern a test that permitted aid "to the students" but not to schools. For example, the Court allowed governments to provide free transportation and free loans of textbooks for parochial school students. Everson, supra (transportation); Board of Education v. Allen, 392 U.S. 236 (1968) (textbooks). This distinction broke down, however, as it became apparent that all assistance to children attending parochial schools relieved the schools themselves of some expenses, or took a burden off parents and thereby encouraged them to send their children to parochial schools. Thus, the "student benefit" test eventually yielded to the "Lemon test" outlined above: aid must have a primarily secular purpose and effect, and not require excessive government "entanglement" to administer.

569. Programmes providing direct financial assistance to church-connected schools have generally been struck down on the ground that excessive government entanglement would be required to ensure that the state aid was not used to inculcate religion. Among the programmes struck down have been a programme of direct money grants for maintenance of school facilities and equipment, Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); and a programme for lending instructional materials and equipment (e.g., slide projectors, tape recorders) to religious schools; providing auxiliary services (e.g., remedial and accelerated instruction, diagnostic services, guidance counselling, testing) by public employees on religious school premises, Meek v. Pittenger, 421 U.S. 349 (1975). The U.S. Supreme Court has, however, upheld a programme in which state supplied standardized tests and scoring services, provided diagnostic services by public employees on the premises, and provided guidance and remedial services off premises, Wolman v. Walter, 433 U.S. 229 (1977); provision of free transportation to parochial school students, Everson, supra; loan of public school textbooks to parochial schools, Allen, supra. Most recently, the Court held that providing a sign language interpreter to a deaf child in Catholic high school does not violate the Establishment clause. Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (1993).

570. More lenient standards have been applied where the governmental assistance goes to an institution of higher education. See, e.g., Tilton v. Richardson, 403 U.S. 672 (1971), in which the Court theorized that it is possible, with respect to an institution of higher learning, to assist the secular facet of the school without appearing to endorse its religious mission.

571. More than once in this century, the issue has arisen whether states can prohibit the teaching of evolution, or require that biblical "creationism" be included in public school texts. The Court struck down a state statute which made it unlawful for any teacher in any state-supported educational institution to teach the theory of evolution or to use a textbook that teaches this theory, since the statute's sole purpose was a religious one, i.e., to suppress a particular theory because of its supposed conflict with the Bible. Epperson v. Arkansas, 393 U.S. 97 (1968). Similarly, the Court recently struck down a state statute prohibiting public schools from teaching evolution science unless creation science was also taught. Edwards v. Aquillard, 482 U.S. 578 (1987).

572. A third general category of controversial cases involves more general public endorsement of religion. One particular area of conflict involves the display of nativity scenes on government property during the Christmas season. For example, in County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989), a county was sued over two different displays. The first was outside in a public park, and contained a Christmas tree, a Hanukkah menorah, and a sign saluting "liberty". The Court found no violation of the Establishment clause, as the tree is a secular symbol of Christmas, there were symbols of different faiths, and the sign referring to liberty showed no favouritism or hostility toward any one faith. The second display, on the other hand, contained a crèche, unaccompanied by non-religious Christmas elements, in the main part of the county courthouse during the Christmas season. A sign hung over it, proclaiming "Gloria in Excelsis Deo!" Furthermore, the courthouse had a very grand staircase where the crèche was set up, and the county further associated itself with the display by means of press releases and by placing decorations similar to those in the display next to the official county signs in the courthouse. The Court held that the crèche violated the Establishment clause, because the grandeur of the setting might be fairly understood to express views that received the support and endorsement of the government. The display was found to endorse a patently Christian message, and the Court declared that the government may not celebrate Christmas as a religious holiday, because such a celebration would mean that the government is declaring Jesus to be the Messiah, a specifically Christian belief, and such a proclamation would contradict the logic of secular liberty which it is the purpose of the Establishment clause to protect.

573. **Freedom of conscience and compulsory military service.** At the current time, U.S. law does not provide for conscription into the armed forces. All service in the armed forces is voluntary. Congress is actively considering eliminating even the current requirement that individuals register with the government for purposes of conscription, which is known as the Selective Service System. In times of national emergency, U.S. law does provide for the possibility of conscription. But in relatively recent emergencies, such as

the Persian Gulf war, conscription was neither used nor even seriously considered. U.S. law does not provide for the conscription of women.

574. If it becomes necessary to use conscription to fill the ranks, applicable U.S. law (i.e., the Selective Service Act, codified at 50 U.S.C. App. section 456(j)) provides for full consideration of conscientious objector claims. Under this law, personnel who claim, by reason of religious training or belief, conscientious objection to either: (i) participation in armed combat, or (ii) war in any form, are upon review and confirmation by the local Selective Service Board, designated as non-combatants, or if opposed to participation in non-combatant service, assigned to civilian national service. The period of such national service would be the same as the initial service required if the individual were conscripted. There are no political or social penalties consequent upon conscientious objector status. U.S. law specifies that the term "religious training or belief" does not include political, sociological, or philosophic views, or merely a personal moral code.

575. Under implementing regulations, 32 C.F.R. sections 1648.1-7, conscientious objector claims may be heard at or before induction by a local draft board. Claimants are entitled to notice and an opportunity to be heard before a board. Claimants may appear in person at the hearing and may be accompanied by an adviser of their choice. Claimants may present evidence and witnesses, discuss the pending conscription classification, direct attention to any information in the file considered material or relevant, and present such further information as he may believe will assist the board in evaluating his claim. The claimant may summarize in writing such oral information as he presented, and the summary must be included in the file. Proceedings of the board are open if the claimant so requests. The task of the board is to determine the honesty and sincerity with which the individual holds the belief. This is done on a case-by-case basis. The belief need not be "religious", in the orthodox sense, nor is membership in a particular church required. Denial of conscientious objector status may be appealed, first to the district Selective Service Board, and ultimately to the federal court system.

576. Generally, the same rules apply to persons who, while serving in the armed forces, develop beliefs inconsistent with continued service. According to applicable regulations, a member wishing to claim conscientious objector status may make application to his or her commander for either administrative discharge or change to non-combatant status. See Department of Defense Directive 1300.6 (20 August 1971) as amended, and implementing regulations. As a matter of policy, an effort is made to assign such personnel to administrative or other duties posing the minimal practical conflict with the professed beliefs pending action on their claims.

577. Claimants are entitled to notice and a hearing before an impartial hearing officer who is charged with determining the sincerity and honesty with which the stated beliefs are held, and producing a report with findings and recommendations. The cognizant commander may not deny the application, but must review, comment upon, and forward it to the Secretary concerned, through the chain of command. Authority to approve, but not to deny, such applications may be delegated to the officer exercising general court-martial jurisdiction over the applicant. Hearings are informal in nature and not

conducted in strict compliance with the rules of evidence. Claimants are generally afforded the same procedural rights as are provided to preinduction claimants. Substantive standards are also the same. There is, for example, no requirement that a belief be associated with a particular church, or even that a belief be consistent with the dogma of an established church. Honest disagreement with the theology of one's chosen church is not a bar to conscientious objector status. Depending on the nature of the objection, an individual found to be a conscientious objector will either be honourably discharged or designated as a non-combatant.

578. Denial of the claim may be administratively or judicially appealed. For example, a member may petition the cognizant Service Secretary for correction of the member's records through the applicable Boards for Correction of Naval or Military Records. Alternatively, or subsequently, a member may appeal to the cognizant federal district court.

579. A person discharged as a conscientious objector forfeits most, but not all, benefits administered by the Veterans Administration. The individual is advised of this fact prior to making application and signs a document signifying his or her understanding. There are no other political effects or changes in civil status consequent upon declaration of conscientious beliefs. A person designated as a non-combatant does not lose veterans benefits but may, at the discretion of the military department concerned, be denied an opportunity to re-enlist at the end of the current enlistment. Again, there are no political effects or civil status changes consequent upon non-combatant designation.

Article 19 - Freedom of opinion and expression

580. The First Amendment to the U.S. Constitution provides that "Congress shall make no law abridging the freedom of speech". Although the First Amendment refers specifically to Congress, the U.S. Supreme Court has held that freedom of speech is also protected from state infringement, and similarly from interference by executive branch officials. As with the other components of the Constitution's Bill of Rights, freedom of speech is protected against government interference, and also actions by private individuals so closely associated with government officials that they may be described as state action.

581. **Freedom of opinion**. While the literal language of the First Amendment is confined to the freedom of speech, that right - together with the due process guarantees of the Fifth and Fourteenth Amendments - has long been held to extend the right to hold opinions described in article 19, paragraph 1, of the Covenant. "If there is any fixed star in our constitutional horizon, it is that no official, high or petty, can proscribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion". West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943).

582. In the few cases addressing attempts to invade freedom of opinion among the general citizenry, the courts have zealously protected the rights of individuals to dissent. In Barnette, for example, the U.S. Supreme Court prohibited the states from requiring school children to pledge allegiance to America at the start of the school day. The Court has also proscribed

punishing individuals for obscuring a state motto imprinted on their licence plates, reasoning that "the right of freedom of thought protected by the First Amendment against state action includes both the right to refrain from speaking at all", and that an individual may not be forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable". Wooley v. Maynard, 430 U.S. 705 (1977). While these cases have proceeded to evaluate whether the state has a compelling interest in its regulation, that test can be demanding, and the state interest may not in any event serve an ideological function.

583. The only significant area in which the freedom of opinion has arguably been limited concerns the imposition of restrictions on public employment. In this context, which chiefly implicates the right of freedom of association, public employees or candidates for public employment may constitutionally be required to express adherence to certain propositions fundamental to the U.S. system of government - indeed, various provisions of the Constitution themselves require that federal officers take oaths to uphold the Constitution. Similar oaths imposed by statute have been upheld, at least to the extent that they require affirming adherence to the federal or state constitutions, or require a promise to oppose the violent, forceful, or illegal overthrow of the government. Cole v. Richardson, 405 U.S. 676 (1972). At present, federal employees may not advocate the overthrow of the constitutional form of government, or be a member of an organization they know to advocate the same. 5 U.S.C. section 7311. It is elsewhere made clear, however, that an ordinary citizen's membership in the Communist Party is not enough, absent other acts, to violate the criminal law. 50 U.S.C. section 783.

584. **Freedom of expression**. The freedom of speech protected by the First Amendment has been given a broad reading in its application by the courts. Perhaps its most obvious purpose is to prevent the government from restricting expression "because of its message, its ideas, its subject matter, or its content". Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated". Regan v. Time, Inc., 468 U.S. 641 (1984). The First Amendment also limits content-neutral or incidental infringements on speech and speech-related activities, subjecting them to an assessment of whether the regulation furthers a substantial government interest not related to the suppression of speech, and whether the regulation is narrowly tailored to accomplish that interest. O'Brien v. United States, 393 U.S. 900 (1968).

585. The First Amendment has been applied to a broad range of activities. Symbolic speech, moreover, is also protected, as evidenced by recent cases striking down state and federal legislation against flag-burning. Texas v. Johnson, 491 U.S. 397 (1989) (striking a state statute designed to protect the flag from desecration). United States v. Eichman, 496 U.S. 310 (1990) (striking a federal statute enacted in response to Johnson attempting to protect the flag's physical integrity). Other cases have emphasized that money is a form of speech, and that laws limiting campaign expenditures, by reducing the quantity of political expression, may unconstitutionally impact the quality and diversity of speech. Buckley v. Valeo, 424 U.S. 1 (1976).

586. Freedom of speech also encompasses certain rights to seek and receive information. The most important means by which these rights are promoted is by the First Amendment's special concern for freedom of the press, which is protected from prior restraint (that is, censorship in advance of publication) in the absence of proof of direct, immediate, and irreparable and substantial damage to the public interest. New York Times, Inc. v. United States, 403 U.S. 713 (1971). The press, and the public as a whole, have been held to have the right to gather information concerning matters of public significance. For example, the public generally has a right of access to observe criminal trials, since such access is viewed as instrumental to the effectuation of the rights to speak and publish concerning the events at trial. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). This constitutional right has been supplemented by a number of laws promoting access to government, such as the Freedom of Information Act, 5 U.S.C. section 552, the Government in the Sunshine Act, 5 U.S.C. section 552b, and the Federal Advisory Committee Act, 5 U.S.C. App. 2.

587. The question of access to information invariably entails consideration of how to ensure access to points of view or messages that may be inadequately presented by the popular media. Both the political branches and the courts have been careful to restrict governmental regulation of the media - even in the interest of public access - because of the restrictions it may impose on the other First Amendment ideals. Thus, while the U.S. Supreme Court has suggested that the First Amendment encompasses "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences", and upheld government requirements of fairness and diversity in broadcasting, Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), it has stopped short of suggesting that there is a constitutional right of access to the broadcast media, and has never extended a guaranteed right of access or fairness doctrine to the print media.

588. The courts have also held, in the context of government or government assisted programmes, that the government may limit the extent to which such programmes provide access to information for the beneficiaries. Thus, in Rust v. Sullivan, 111 S.Ct. 1759 (1991), the U.S. Supreme Court upheld government regulations proscribing abortion counselling in programmes receiving federal funding, but noted that the recipient of those funds could still provide counselling and related services through separate and independent programmes. The Court noted that its holding merely allowed the government to refrain from funding speech activity that it did not support, and did not suggest that the government could condition or restrict speech in areas that have been traditionally open to the public for free expression, such as public parks or universities.

589. **Limitations on the freedom of expression.** Constitutionally acceptable limits to the freedom of expression fall into at least two broad types. First, and perhaps the most important type of regulation, is that which does not regulate the content of speech - a type of restriction that is rarely upheld - but only incidentally burdens expression to promote non-speech interests. Thus, for example, a law regulating the distribution of handbills may be intended to reduce litter, rather than suppress expression. Such regulations are permitted if they are content-neutral and promote a

substantial governmental interest by the least intrusive means. Similarly, laws may regulate the time, place, or manner of speech if they are not attempts to censor content or unduly burdensome to expression.

590. A second category of permissible limitations describes types of speech that are afforded less protection under the First Amendment. One such type, speech posing a "clear and present danger" to public order, may be punished, but only if the government can establish that such speech was intended to incite or produce imminent lawless action and is likely to achieve that end. Brandenburg v. Ohio, 395 U.S. 444 (1969). Another type of speech, "fighting words", may be proscribed if the prohibition is content-neutral and the words would "by their very utterance inflict injury or tend to incite an immediate breach of the peace". Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). A third type of speech, obscenity, is entirely excluded from First Amendment protection. But obscenity, which is defined as patently offensive representations of sexual conduct without redeeming value, must be regulated in a manner consistent with due process. Miller v. California, 413 U.S. 15 (1973). A fourth type of speech, commercial speech, is entitled to somewhat lesser protection than non-commercial speech, and may for example be regulated to avoid misleading or coercing consumers. City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993).

591. Although speech causing injury to the rights and reputations of others is also subject to some restrictions, in that the person who is injured may bring a civil action for libel or slander, the First Amendment values at stake have also been recognized in this context. An especially significant case, New York Times v. Sullivan, 376 U.S. 254 (1964), and its progeny, have declared that public officials and figures may recover for defamatory statements - at least those relating to public controversies - only if it is proven that the defamatory statement was made with knowledge of or reckless disregard for its falsity. The U.S. Supreme Court has since indicated that the First Amendment also limits defamation actions alleging injury to private persons, and requires at a minimum that the false statement at issue be reasonably interpretable as a statement of actual fact about the individual and that the plaintiff establish fault on the part of the defendant. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

592. **Electronic media**. The Federal Communications Act of 1934 (the "FCA") established the Federal Communications Commission (FCC) for the purpose of regulating interstate and foreign communications by wire and radio. Essentially the FCC is responsible for an equitable and efficient distribution among various users of the available radio frequency spectrum for non-government communications. The constitutional underpinning for the regulation of electronic media is based on the scarcity of available spectrum and the need for an orderly system of interstate communication.

593. Private sector users of this spectrum, e.g. radio and television stations and interstate telephone companies, are licensed by the FCC. Applicants for such licences must demonstrate certain legal, technical and other qualifications. The FCA generally restricts the granting of such licences to U.S. citizens or entities controlled by U.S. citizens. Additionally, there are ownership restrictions as to the overall number of licences that may be held by one person or corporation and in some instances where such licences

may be operated. Potential licensees much also show that the frequencies applied for will be used in a technically compatible manner with those already in operation.

594. A fundamental concept of the regulation of electronic media in the U.S. is that use of the radio spectrum is not owned per se by licensees. Licences are issued for a set period of time after which licensees must seek renewal of their authorizations together with a demonstration that the licence has been used in the public interest. Licences may and have been revoked in instances where it has been shown that the licensee violated provisions of the FCA or regulations promulgated pursuant to the FCA.

595. Mass media outlets such as radio and television stations are free to determine the nature and content of programming aired. The federal government may not censor the programming of any such outlet with certain extremely limited exceptions, e.g. the broadcasting of obscene programming is specifically prohibited by the FCA. Additionally, the Act does require that licensees grant equal time to candidates for federal elective office.

Article 20 - Prohibition of propaganda relating to war or racial, national, or religious hatred

596. **U.S. reservation**. Because of the strength of the First Amendment's protection of freedom of speech, the United States conditioned its ratification of the Covenant on the following reservation:

> "That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."

597. Under the First Amendment, opinions and speech are protected categorically, without regard to content. Thus, the right to engage in propaganda of war is as protected as the right to advocate pacifism, and the advocacy of hatred as protected as the advocacy of fellowship. The U.S. Supreme Court recently struck down a city ordinance that punished written or symbolic "fighting words" that insult or provoke violence on the basis of race, colour, creed, religion or gender. The Court found that the First Amendment does not permit prohibitions on speakers who express ideas on disfavoured subjects. "The government may not regulate use based on hostility - or favouritism - towards the underlying message expressed". R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538 (1992). Similarly, this article would punish certain types of expression inciting discrimination, hostility or violence, but not others, a result that is not permissible under the U.S. Constitution.

598. There remain constitutional means by which the goals of this article have been addressed in the United States. As discussed in connection with article 19, "fighting words" and speech intended and likely to cause imminent violence may be constitutionally restricted, so long as regulation is not undertaken with respect to the speech's content. Moreover, bias-inspired conduct may be singled out for especially severe punishment. Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993). While the federal and state governments are

addressing the problem of hate crimes, and trying to address the underlying causes of such crime, they may not do so in a manner inconsistent with the First Amendment.

599. **Hate crimes**. The Civil Rights Division of the U.S. Department of Justice enforces several criminal statutes which prohibit acts of violence or intimidation motivated by racial, ethnic, or religious hatred and directed against participation in certain activities. The Department of Justice has recently prosecuted such cases involving interference with employment, housing, public accommodations, use of public facilities, and the free exercise of religion. Three federal criminal statutes prohibit such forceful discriminatory activity: 18 U.S.C. section 245 prohibits such interference with a number of protected activities; 42 U.S.C. section 3631 prohibits such interference with buying, selling, or occupying housing; and 18 U.S.C. section 247 prohibits certain activities that interfere with the free exercise of religion. In addition, conspiracies to interfere with protected rights may be prosecuted as violations of section 241.

600. Section 245 prohibits acts of violence or intimidation based on race, colour, religion, or national origin which interfere with certain protected activities. These protected activities include enroling in and attending public school or college, using any government-provided facility or benefit, engaging in public or private employment, serving as a juror, using any facilities of interstate commerce such as buses, airplanes, or boats, and enjoying certain establishments of public accommodation such as hotels and motels, restaurants, movie theatres, sports arenas, bars, night clubs, or other similar establishments.

601. Section 3631 of Title 42 prohibits acts of violence or intimidation in the area of housing. The statute prohibits violence intended to intimidate people in their buying, selling, or occupying housing when that intimidation is motivated by a purpose to discriminate based on race, colour, religion, sex, handicap, familial status, or national origin.

602. Section 247 prohibits the destruction of or significant damage to religious real property, and prohibits the forceful obstruction of any person in that person's enjoyment of his free exercise of religious beliefs. The jurisdiction of section 247 is limited to incidents where the defendant travels in interstate or foreign commerce or where facilities of interstate or foreign commerce are used.

603. The Department of Justice has also begun implementing the Hate Crimes Statistics Act, which was enacted by Congress in April 1990. This Act provides for the collection of statistics on hate crimes nationwide, both from state and federal law enforcement sources. The Department of Justice, through the Federal Bureau of Investigation, is working to obtain the cooperation of all state and local law enforcement agencies in collecting this data.

604. Recent prosecutions under these hate crime statutes include the following:

(a) In United States v. Pierce, in Louisiana, 14 Ku Klux Klan members and associates pleaded guilty to participating in a series of cross burnings

at predominantly African-American schools, homes, churches and in front of the Shreveport federal courthouse on the day that their Grand Dragon was to report to prison on a federal firearms violation. The defendants were sentenced to confinement ranging from a period of home detention to 72 months in prison;

(b) In United States v. Lawrence, in Oklahoma, 17 Oklahoma Skinhead Alliance associates pleaded guilty and were sentenced to as much as nine years imprisonment for their violent interference with the use by minorities of a public park and a live music club, in violation of 18 U.S.C. section 245;

(c) In United States v. Piche, in North Carolina, the defendant was convicted for the assault and death of an Asian man who was patronizing a bar, in violation of 18 U.S.C. section 245. The court sentenced the defendant to four years in prison and ordered him to pay $28,000 restitution. An appellate court has since agreed with the government's position that this sentence is illegally low, and resentencing is pending;

(d) In United States v. LeBaron, in Texas, several members of a religious sect were convicted under 18 U.S.C. section 247 for murdering several former members of the sect. These defendants believed in and actively practised the concept of "blood atonement", whereby defecting members were sentenced to death for their breach of faith. They believed that these defecting members must be killed before the Kingdom of God can arrive. After travelling interstate from Arizona to Texas, the defendants carefully planned the murders. The defendants ambushed three former sect members and one witness, the daughter of one of the victims, and killed them. These defendants were sentenced to life imprisonment.

605. Hate crime perpetrators are not limited to members of organized groups. Cross burnings, arsons and shootings involving the homes of African-American families have also been prosecuted in rural areas of Virginia and North Carolina against individuals who were not affiliated with any racist organization. In both cases, the newly purchased homes of African-American families were set afire before they were occupied.

606. Some states have attempted to deal with hate crimes by enhancing the punishment for acts of violence or intimidation when they were motivated by racial or religious hatred. Recently, such a statute was challenged on the theory that it punished "thought". The U.S. Supreme Court rejected this challenge, holding that it has always been acceptable to make motive a variable in the definition and punishment of crime, Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993).

Article 21 - Freedom of assembly

607. The First Amendment to the U.S. Constitution proscribes the making of any law abridging "the right of people peaceably to assemble". This right has been interpreted quite broadly. Thus, for example, it was held nearly 50 years ago that participation in a Communist Party political meeting could not be made criminal unless violence is advocated. DeJonge v. Oregon, 299 U.S. 353 (1937). The assembly for marches, demonstrations, and picketing is also protected, see Hague v. CIO, 307 U.S. 496 (1939), as is the right to conduct labour organization meetings, Thomas v. Collins, 323 U.S. 516 (1945).

608. Because the freedom of speech under the U.S. Constitution entails the freedom to engage in symbolic speech and expressive conduct, cases involving the right to assemble are frequently resolved by applying free speech analysis. The right to assemble is thus subject to reasonable time, place, and manner restrictions when exercised in a traditional or government-created public forums, and may be subject to reasonable, non-content-based restrictions in other forums. The Court has defined three different categories of public property or types of "public" forums. First is the fully public forum, which includes streets, parks, and other places traditionally used for public assembly and debate. In these areas, the government may not prohibit all communicative activity and must justify any content-neutral, time, place, and manner restrictions as narrowly tailored to serve a legitimate state interest. The second category is the "limited public forum" where the government has opened property for communicative activity and thereby created a public forum. In this category, the government may limit the forum to use by certain groups; Wider v. Vincent, 454 U.S. 263 (1981) (student groups), or for discussion of certain subjects, City of Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) (school board business). The last forum category is where the government "reserve(s) a forum for its intended purposes ... as long as the regulation or speed is reasonable and not an effort to suppress, express or merely because public officials oppose the speaker's views". Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). Government regulation of the second category requires a "compelling" state interest while regulation of the third category need only be reasonable.

609. Where a public forum has multiple, competing uses, the U.S. Supreme Court has upheld a regulation limiting the time when a public park can be used, even when that limitation restricted the ability to demonstrate against homelessness by sleeping in symbolic "tent cities" in the park. See Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Similarly, governments may impose permit requirements on those wishing to hold a march, parade, or rally. See Forsyth County v. Nationalist Movement, 112 S.Ct. 2395, 2401 (1992). The power to regulate is at its greatest when more limited forums, such as military bases or airports, are at issue. See e.g. International Society of Krishna Consciousness v. Lee, 112 S.Ct. 2701 (1992).

610. However, there are important constitutional limits to such intrusions. A law limiting certain types of picketing or demonstration but not others, for example, would be an impermissible content-based restriction. E.g. Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). Moreover, licensing or permit systems may not delegate overly broad licensing discretion to government officials, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication. In Forsyth County v. Nationalist Movement, for example, the U.S. Supreme Court struck down as unconstitutional a law which empowered a county administrator to adjust a permit fee for demonstrators based on the likely expense of maintaining public order. Reviewing a challenge brought by a controversial group that was expected to cause considerable disruption, the Court held that such a rule was unconstitutional both because it vested too much discretion in the administrator and because it was based inevitably on content: to estimate the cost of providing security, the administrator would have to examine the

content of the parade's message, the likely public reaction, and judge the number of police necessary to provide protection. Similarly, in Shuttleworth v. City of Birmingham, 394 U.S. 147 (1969), a city ordinance permitting denial of a parade permit where required by "the public welfare, peace, safety, health, decency, good order, morals or convenience" was held to be unconstitutional on its face because of the discretion it vested in the city administrator.

611. The ability of governments to limit assembly depends considerably on the primary activity of the locales in question, in tandem with the type of regulation. For example, the government may prohibit the distribution of leaflets inside a courthouse, but not outside the courthouse, where it is limited to reasonable time, place, or manner restrictions, as the area around a courthouse is traditionally considered a public forum appropriate for public demonstration or protest. See United States v. Grace, 461 U.S. 171 (1983). However, demonstrations or assemblies near a jail may be entirely prohibited, Adderly v. Florida, 385 U.S. 39 (1966), and the government may prohibit demonstrations within a defined proximity to a courthouse when the purpose of the demonstration is to influence judicial proceedings. Cox v. Louisiana, 379 U.S. 559 (1965).

612. American courts will closely scrutinize the intent of government regulation of the right of assembly and require that intrusive regulations be narrowly tailored. Thus, in Boos v. Barry, 485 U.S. 312 (1988), the U.S. Supreme Court struck down a statute prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tended to bring the embassy's government into disrepute. The Court held that the law was a content-based restriction on political speech that was not narrowly tailored to prevent actual intimidation or harassment of foreign diplomats. However, the Court upheld a second portion of the law prohibiting three or more persons from congregating within 500 feet of the embassy if the group refused to disperse after being requested by the police. The Court narrowly interpreted the statute to permit ordering dispersal only when such congregations were reasonably believed to threaten the security or peace of the embassy.

Article 22 - Freedom of association

613. U.S. Constitution. Although the freedom of association is not specifically mentioned in the U.S. Constitution, it has been found to be implicit in the rights of assembly, speech, and expression. See NAACP v. Claiborne Hardware Co., 458 U.S. 898 (1982); Healey v. James, 408 U.S. 169 (1972). Taken together, these provisions of the First, Fifth and Fourteenth Amendments guarantee freedom of assembly in all contexts, including the right of workers to establish and join organizations of their own choosing, without previous authorization by or interference from either the federal government or the state governments. See Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 (1967).

614. Accordingly, attempts to subject association membership to undue burdens have been strictly reviewed, at least where the association's function is related to other fundamental rights. In Scales v. United States, 367 U.S. 203 (1961), for example, the U.S. Supreme Court held that membership in a

political association could be criminally punished only if the state was required to show active membership, knowledge of the association's illegal objectives, and specific intent to further those objectives. This requirement has likely been heightened by subsequent developments in the "clear and present danger" doctrine, discussed under article 19.

615. Lesser impositions, such as attempts to compel the disclosure of membership in such associations, are also subjected to heightened review, and will ordinarily not survive review where there is a reasonable probability that disclosure will subject those identified to threats, harassment, or reprisals. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982). Similarly, constraints on the organization of political parties must be narrowly tailored and serve compelling state interests. Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989). The right of association members to engage in protected activities is also secured, and may not generally be subjected to the risk of liability for the actions of other group members. NAACP v. Claiborne Hardware Corp., 458 U.S. 886 (1982). At the same time, the right to associate (and the corollary right to be free from association) may be subject to narrow regulation justified by a substantial public interest. Thus, in Roberts v. United States Jaycees, 468 U.S. 609 (1984), the U.S. Supreme Court held that a private organization engaged in expressive activities might nevertheless be subject to state laws prohibiting discrimination in its membership.

616. Associations less clearly dedicated to protected activities, such as those that are commercial in nature, will typically enjoy less freedom from regulation. Roberts, supra. The distinction between expressive and commercial activities of associations is an important one, and explains how the states are permitted to regulate the membership of labour unions in their representation of the business interests of employees, but not to compel the association with unions engaged in ideological or expressive activities. Roberts, supra (O'Connor, J., concurring).

617. Labour associations. The rights of association and organization are supplemented by legislation, including the Railway Labor Act (1926), the Norris-LaGuardia Act (1932), the National Labor Relations Act (1935), the Labor-Management Relations Act (1947), the Labor-Management Reporting and Disclosure Act (1959), the Postal Reorganization Act (1970), and the Civil Service Reform Act (1978), as well as state and local legislation. The National Labor Relations Act, 29 U.S.C. sections 151 et seq. (NLRA), which enunciates U.S. national labour relations policy, governs the relationship between most private employers and their non-supervisory employees.

618. The NLRA guarantees the right of covered employees to organize and bargain collectively with their employers or to refrain from such activity. Section 7 of the NLRA guarantees that "employees shall have the right to self-organization, to form, join or assist labour organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection...". 29 U.S.C. section 157. Examples of rights protected by Section 7 are: forming or attempting to form a union among the employees

of a company; joining a union whether the union is recognized by the employer or not; assisting a union to organize the employees of an employer; and refraining from activity on behalf of a union.

619. The NLRA expressly protects covered employees against acts of anti-union discrimination. Section 8(a)(3), 29 U.S.C. section 158(a)(3), makes it an unfair labour practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labour organization ...". Section 8(a)(4), 29 U.S.C. section 158(a)(4), makes it an unfair labour practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]".

620. The NLRA protects workers' and employers' organizations from interference by each other. Section 8(a)(1), 29 U.S.C. section 158 (a)(1), provides that it is an unfair labour practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA. It is also an unfair labour practice for an employer to "dominate or interfere with the formation or administration of any labour organization or contribute financial support to it ...". 29 U.S.C. section 158(a)(2).

621. The NLRA also protects labour organizations from employer interference by generally prohibiting the payment of anything of value by an employer to any worker representative, to any labour organization, or to any labour organization officer or agent. In addition, no payments may be made to a group of employees in excess of their normal wages and compensation, for the purpose of causing the group to influence other employees in the exercise of their right to bargain collectively through representatives of their own choosing. These provisions carry criminal penalties and are enforced by the U.S. Department of Justice. 29 U.S.C. section 186.

622. The provisions of the NLRA generally apply to all employers engaged in an industry affecting interstate commerce (the vast majority of employers), and thus, to their employees. As with U.S. labour laws generally, it applies to employees regardless of their nationality or legal status in the U.S. However, the NLRA excludes from coverage railway and airline workers, and government employees; as well as agricultural, domestic and supervisory employees, employees of entirely non-profit hospitals, independent contractors, and individuals employed by a spouse or a parent. 29 U.S.C. section 152(3).

623. Railway and airline employees are covered by the Railway Labor Act (RLA), 45 U.S.C. sections 151-88, and are provided protections against anti-union discrimination similar to those contained in the NLRA. The RLA expressly recognizes that employees "have the right to organize and bargain collectively through representatives of their own choosing", prohibits a carrier from denying "the right of its employees to join, organize, or assist in organizing the labour organization of their choice", and makes it unlawful for an employer to "interfere in any way with the organization of its employees ... or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labour organization ...". 45 U.S.C. section 152.

624. The right of employees of the U.S. Government to organize is governed by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. sections 7101-35. The CSRA applies to almost all federal civilian employees, and provides that "[e]ach employee shall have the right to form, join, or assist any labour organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right". Id. at section 7102. State and local governments have a diverse variety of legislation covering collective bargaining by state and local employees; however, those laws must be consistent with the fundamental Constitutional guarantees of freedom of association.

625. Private-sector employees who are not covered by the NLRA or the RLA (primarily agricultural, domestic, and supervisory employees who are excluded from NLRA coverage under 29 U.S.C. section 152(3)), are none the less protected by the Constitution of the United States. As noted above, the First, Fifth and Fourteenth Amendments of the Constitution guarantee that workers are entitled to establish and join organizations of their own choosing, without previous authorization by or interference from either the federal government or the state governments. The exclusion of these categories of employees from coverage means only that they do not have access to the specific provisions of the NLRA or RLA for enforcing their rights to organize and bargain collectively.

626. In addition to the NLRA and RLA, the Norris-LaGuardia Act protects employees in the exercise of their right to organize and bargain collectively by limiting federal court jurisdiction to grant injunctive relief in labour disputes. The policy of the Act expressly recognizes that it is necessary for an employee to "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labour, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...". 29 U.S.C. section 102. Employees such as agricultural and supervisory workers who are not covered by the NLRA are none the less covered by the Norris-LaGuardia Act.

627. In addition to federal legislation, most states have constitutional provisions or legislation that expressly guarantee the right to organize and bargain collectively. Thus, state laws frequently provide coverage for employees who are not within the jurisdiction of the NLRA. These state laws are in most cases patterned on the NLRA or the Norris-LaGuardia Act, or provide other similar provisions. As noted above, even in the absence of state law, the fundamental right of association is guaranteed by the First and Fourteenth Amendments of the United States Constitution.

628. The National Labor Relations Board (NLRB) is an independent federal agency that administers, interprets, and enforces the NLRA. The NLRB consists of five board members (the Board) appointed by the President with the approval of the Senate for five-year staggered terms; the General Counsel, an independent officer appointed by the President with the approval of the Senate for a four-year term; and the regional offices

629. An unfair labour practice case is initiated by an individual, union, or employer by filing a charge with an NLRB regional office alleging a violation of the NLRA by an employer or labour organization. The charge is investigated by the regional office on behalf of the General Counsel to determine whether there is reasonable cause to believe that the NLRA has been violated. If the Regional Director concludes that the charge has merit, the Regional Director will seek to remedy the apparent violation by encouraging a voluntary settlement by the parties. Most cases are settled voluntarily.

630. If a case is not settled, a formal complaint is issued and a hearing is held before an Administrative Law Judge (ALJ). At the hearing, the parties are entitled to appear; to call, subpoena, examine and cross-examine witnesses; and to introduce evidence. The case is prosecuted by an attorney from the regional office on behalf of the General Counsel. After the hearing and after the parties have briefed the issues, the ALJ issues a decision containing proposed findings of fact and a recommended order.

631. Any party may appeal the ALJ's decision to the Board, which may adopt, modify or reject the findings and recommendations of the ALJ. If no exceptions are filed to the ALJ's decision, that decision and recommended order automatically become the decision and order of the Board.

632. If a party fails to comply with the Board's order voluntarily, the office of the General Counsel files an enforcement petition in the United States Court of Appeals. Similarly, any "person aggrieved" (which includes both the respondent and the charging party) by a final order of the Board may seek to have the order reviewed and set aside by filing a petition with the United States Court of Appeals.

633. The Federal Labor Relations Authority performs functions for federal employee labour organizations similar to those performed by the NLRB for private-sector employees, including resolution of complaints of unfair labour practices and disputes over the scope of collective bargaining negotiations. 5 U.S.C. sections 7104-05. In addition, the Federal Mediation and Conciliation Service (FMCS) (which is responsible for assisting parties to labour disputes, at their request, to settle such disputes through conciliation and mediation) has authority to help resolve bargaining disputes between federal agencies and labour organizations.

634. Machinery for ensuring protection of freedom of association is also provided under the RLA and state laws. The RLA establishes the National Mediation Board which performs for the railway and airline industries functions similar to those performed for other industries by the National Labor Relations Board and the Federal Mediation and Conciliation Service. However, the RLA's provisions are enforced by civil suit, and are subject to criminal penalties for wilful failure or refusal of a carrier to comply. 45 U.S.C. section 152. State law machinery varies, with some states providing administrative procedures similar to the NLRA, and other states relying on enforcement by private actions in the judicial system.

635. **Trade union structure and membership**. The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), which comprised 85 national union affiliates as of August 1993, is the largest federation of

trade unions in the United States. Another 82 national unions are independent. These include the National Education Association, with some 2 million members, and the United Electrical Workers, with 80,000 members.

636. The AFL-CIO network comprises its national headquarters, which houses the various trade and industrial departments, and eight regional divisions. The regions include 50 state federations and one commonwealth central body at the state level, and hundreds of central councils at the local level. The AFL-CIO lobbies for labour's interests before Congress and state legislatures, monitors state and federal regulatory activities, and represents labour in various national and international forums. It disseminates labour policy developed by its affiliates, provides research and other assistance through its various departments, and assists in coordinating organizing among its affiliates. Member unions pay dues to support the activities of the federation and its various trade and industrial departments. Affiliated unions usually belong to a number of trade and industrial departments that represent their interests before the government and elsewhere.

637. Unaffiliated unions operate much like those affiliated with the AFL-CIO. On legislation and in election campaigns, they often coordinate with the AFL-CIO to present a common front.

638. According to the Department of Labor's Bureau of Labor Statistics (BLS), in 1992, an estimated 16,390,000 employed wage and salary workers in the United States (15.8 per cent of all employed wage and salary workers) belonged to labour unions. Of those, 6,650,000 were employed in government, and 9,740,000 were employed in private industry.

639. Among the private industry groups, manufacturing had the largest number of union members (3,749,000), followed by transportation and public utilities (1,922,000); services (1,487,000); wholesale and retail trade (1,402,000); construction (906,000); finance, insurance and real estate (144,000); mining (94,000); and agriculture (37,000).

640. Nearly 37 per cent of government (federal, state and local) employees were union members, as compared to some 11 per cent of wage and salary workers in private industry. Although, as seen above, the manufacturing industry accounted for the largest number of union members, transportation and public works had the highest percentage of union employees (nearly 31 per cent), followed by construction and manufacturing (20 per cent each), and mining (15.1 per cent). Percentages for the other private industry groups ranged from 2 to 7 per cent.

641. The percentage of union members was greater among full-time workers (nearly 18 per cent) than part-time workers (some 7 per cent), and among men (19 per cent) than women (nearly 13 per cent). African-Americans (21 per cent) were more likely than either whites or Hispanics (both 15 per cent) to belong to unions.

642. In addition to the estimated 16.4 million wage and salary employees who belonged to unions in 1992, there were more than 2 million workers whose jobs were covered by a union (or employee association) contract, but who were not union members.

643. **Political parties and political activities of tax-exempt organizations.** Political parties were somewhat disdained by many of the founding fathers and are not mentioned in the U.S. Constitution. Nevertheless, political parties soon became an integral part of the American system and, reflecting the federal structure, have functioned at both the state and national levels. Even today, political parties are seldom mentioned in federal law and regulations. None the less, political parties are protected through the constitutionally guaranteed freedom of association.

644. A fundamental purpose of political parties is the selection and promotion of candidates for elected office who can advance that party's platform. Since the states, not the federal government, are the locus of ballot formulation, the registration of political parties is a matter of state jurisdiction, generally under the purview of each state's Secretary of State or equivalent chief electoral official. The primary benefit of a party attaining recognition by the state government is that its nominees usually are automatically placed on the general election ballot without the petition requirement required for individuals running as independents. In most of the states in which the party's nominees are selected through a primary election, obtaining recognition also affords a government-financed and -administered election. To qualify as a party, an association generally has to demonstrate some measure of popular support within the state, either by petition or by securing a percentage of the vote in the previous election. This threshold can be as low as 500 signatures (New Mexico) or as high as 20 per cent of the vote in the last state-wide election (Georgia).

645. Since ballot access is secured at the state level, the importance of a political party obtaining recognition at the national level is not as great in the United States as in countries that administer elections at the national level. There is no federal ballot; all federal candidates, even those for the President, must share placement with state and local candidates on a state ballot.

646. There are, however, certain financial benefits for a federal political committee qualifying as a "national political party". It may receive contributions from individual supporters up to $20,000 a year, rather than the $5,000 annual limit applied to other non-candidate federal political committees.

647. Moreover, the "national committee" of a political party engaged in the presidential election may qualify for government payments to conduct a nominating convention. The nominee of a national political party for the presidential general election can also qualify for a public subsidy for his or her campaign expenses. Candidates seeking the presidential nomination of a national political party are also entitled to a measure of public matching funds for their state primary campaigns if they can demonstrate a relatively small, but broad, financial base ($5,000 comprising individual donations of $250 or less in each of 20 states - for a total of $100,000). At present, the public subsidies to parties and candidates extend only to expenses in connection with campaigns for the office of President; there are no public subsidies for candidates for the U.S. Senate or House of Representatives for either primary or general elections.

648. To attain national party committee status under the Federal Election Campaign Act, a prospective party organization need only demonstrate that it is an ongoing political association with the traditional organizational attributes and objectives of a political party and place candidates for federal office on the ballot in several states. If a new or minor party's presidential general election candidate secures at least 5 per cent of the popular vote in a general election, the candidate may qualify for government reimbursement for part of the general election expenses and the party will be entitled to partial public funding for its next general election nominee. Major party nominees (those securing 25 per cent or more of the vote in the last election) are entitled to full, advance public funding of their general election campaigns. Any candidate that accepts public funds must abide by the expenditure limits and conditions that accompany that grant.

649. Although the national committees of political parties supporting presidential candidates enjoy certain financial benefits, there are regulatory costs associated with being recognized as a federal political committee. Any local party organization or group of any kind spending more than $1,000 to influence a federal election must register as a political committee with the Federal Election Commission (FEC); restrict its sources of revenue according to the law; report its financial activity to the FEC; and abide by the limitations on contributions to, and spending on behalf of, candidates. At the local level, political party committees who wish only to support state and local candidates may seek to avoid this obligation.

650. Because of the reporting requirements and restrictions on fund-raising, some national non-profit organizations that address political issues also try to avoid characterization as a political party or political committee. In addition to being subject to the FEC requirements noted above, such organizations would lose a federal tax benefit if they became political committees. While the federal tax code exempts both charitable organizations and political parties from taxation, a contribution from an individual to a political party is not tax deductible for the donor whereas a donation to a public charitable organization is tax deductible. In sum, a non-profit, public charity can offer its donors a tax deduction and can spend unlimited amounts of money speaking publicly on issues, even political issues, without incurring legal obligations under the Federal Election Campaign Act.

651. In some situations, organizations that are exempt from federal income tax under section 501(a) of the Internal Revenue Code as organizations described in section 501(c) may engage in activities that relate directly or indirectly to the political process. In particular, charitable organizations described in section 501(c)(3) that are eligible to receive tax-deductible contributions may conduct non-partisan voter education activities or advocate positions on issues that are also being addressed by candidates for public office. However, section 501(c)(3) organizations are prohibited from participating in, or intervening in (including the publishing or distributing of statements) any political campaign for or against any candidate for public office. The courts have confirmed that this prohibition is absolute. Thus, any political activity by a section 501(c)(3) organization may jeopardize its exempt status. Other section 501(c) organizations are similarly precluded from political

activities because the subparagraph in which they are described limits them to an exclusive purpose (for example, section 501(c)(2) title holding companies and section 501(c)(20) group legal services plans).

652. On the other hand, some organizations that are exempt from federal income tax, pursuant to other provisions of section 501(c) of the code, may engage in a certain amount of political activity without jeopardizing their exempt status. A section 501(c) organization (other than those such as section 501(c)(3) organizations that are specifically prohibited from engaging in political activities) may generally make expenditures for political activities if such activities (and other activities not furthering its exempt purposes) do not constitute the organization's primary activity. Some of the section 501(c) organizations that have been held to be able to engage in political activities are social welfare organizations described in section 501(c)(4), labour organizations described in section 501(c)(5), business leagues described in section 501(c)(6), and fraternal beneficiary societies described in section 501(c)(8). Generally, these organizations are not eligible to receive tax-deductible contributions.

653. Political organizations under section 527 of the Code include organizations that operate primarily for the purpose of accepting contributions, or making expenditures, or both, in order to influence or attempt to influence the selection, nomination, election or appointment of an individual to a federal, state or local public office or office in a political organization. These organizations are not required to pay federal income tax on contributions and other fund-raising income, but are required to pay federal income tax on their investment income. Contributions to political organizations are not tax-deductible.

654. A proliferation of small political parties, focusing on narrow issues, is structurally discouraged by the majoritarian nature of the United States electoral process, which provides for single member districts with a plurality victor. This system of representation tends to encourage the establishment and maintenance of a two-party system with both parties appealing to a broad cross-section of the population. Attractive new political parties and issues tend to be absorbed over time within one or the other mainstream party.

Article 23 - Protection of the family

Right to marry

655. United States law has long recognized the importance of marriage as a social institution which is favoured in law and society. Marriage has been described as an institution which is the foundation of society "without which there would be neither civilization nor progress". Maynard v. Hill, 125 U.S. 190, 211 (1888).

656. Marriage may be defined as the status of relation of a man and a woman who have been legally united as husband and wife. Marriage is contractual in nature, in that it creates certain rights and responsibilities between the parties involved. However, the contract of marriage is unique in the eyes of the law. As one court stated:

"While we may speak of marriage as a civil contract, yet that is a narrow view of it. The consensus of opinion in civilized nations is that marriage is something more than a dry contract. It is a contract different from all others. For instance: only a court can dissolve it. It may not be rescinded at will like other contracts. Only one such can exist at a time. It may not exist between near blood kin. It legitimizes children. It touches the laws of inheritance. It affects title to real estate. It provides for the perpetuity of the race. It makes a hearthstone, a home, a family. It marks the line between the moral of the barnyard and the morals of civilized men, between reasoning affection and animal lust. In fine, it rises to the dignity of a status in which society, morals, religion, reason and the state itself have a live and large interest."

Bishop v. Brittain Inv. Co., 129 S.W. 668, 676 (Mo. 1910).

657. This report focuses only on legal and civil aspects of marriage. Persons in the United States are free to marry within or outside a religious setting; the choice in no way affects the legal status of a marriage.

658. Constitutional limitations. Marriage and the regulation thereof is generally regarded as a matter for the states. The U.S. Supreme Court has recognized, however, that the states' rights in this area are subject to certain constitutional limitations. For example, in Loving v. Virginia, 388 U.S. 1 (1967), the U.S. Supreme Court struck down a Virginia law that prohibited interracial marriages. The Court held that the statute, which was similar to those in effect in 15 other states at the time, discriminated on the basis of race in violation of the Equal Protection clause of the Fourteenth Amendment. The Court went on to hold that the law violated a fundamental liberty protected by the Due Process clause of the Fourteenth Amendment - the right to marry.

659. The Loving decision served as the catalyst for the reform of many archaic state laws such as those forbidding marriage between paupers or very distant relatives. In addition, subsequent decisions have expanded upon the right to marry as a limitation on the power of the states to regulate the institution of marriage. For instance, the Court has found that the penumbra of constitutional privacy rights includes not only the right to marry, but also a right to privacy within marriage. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (overturning a Connecticut State statute forbidding the use or sale of contraceptives to married persons). In Zablocki v. Redhail, 434 U.S. 374 (1978), the U.S. Supreme Court struck down a Wisconsin statute that withheld marriage licences from persons required to pay child support unless they could provide proof to a court that they had been making regular payments. In its opinion, the Court noted the traditional right of states to regulate marriage. But, the Court said, these restrictions must be reasonable, must not interfere with the right to marry and must be narrowly tailored to achieve their required ends. The Supreme Court has also viewed the Fourteenth Amendment as a limitation on the reasons for which parents may be separated from their children. See Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that the Fourteenth Amendment prohibits consideration of the race of a step-parent in deciding whether the natural parent is fit to retain custody of a child).

660. Within these constitutional parameters, states have primary authority for regulating the inception, status, duration and termination of the right to marry. Indeed, it has been said that there can be no valid marriage without the consent of the state. See Eaton v. Eaton, 92 N.W. 995 (1902); Campbell v. Moore, 1 S.E.2d 784 (1939). In general, each state has the power to regulate marriages within that state, and Congress has jurisdiction over marriages in the territories of the U.S., in the District of Columbia, and between members of certain Indian tribes. In practice, Congress has largely delegated its authority in these areas to local legislative bodies. Among the types of regulations governing marriage are those restricting age, limiting marriage between close relatives, and creating certain procedural requirements such as licensing and blood tests.

661. **Capacity to marry**. The traditional common-law rule in most American jurisdictions, before the enactment of statutes covering the issue, had been that males had the capacity to contract marriage at the age of 14, and females at 12. Legislative changes have significantly increased the age. Today, there is a substantial consensus among the states that 18 is the age at which a person should be allowed to marry without parental consent. Most states also agree that this age should be the same for men and women. See, e.g., Alaska Stat. section 25.05.011 (1991); Colo. Rev. Stat. section 14-2-106 (1989); Mass. Gen. Laws Ann. ch. 207 section 7 (1981); Tenn. Code Ann. section 36-3-106 (1991); W.Va. Code section 48-1-1 (1992). Only one state - Mississippi - permits marriage before age 18 without parental consent. However, marriage of even younger persons is frequently authorized where pregnancy or birth of an illegitimate child is involved. A handful of states still have different age requirements for males than for females. This raises the question of whether these statutes are in violation of the Equal Protection clause of the U.S. Constitution, but the U.S. Supreme Court has never addressed this question.

662. In addition to age restrictions, most states have restrictions prohibiting the marriage of mental incompetents. There is no general rule among the states as to what constitutes sufficient mental capacity. The most accepted test appears to be whether a party to a marriage contract has the capacity to understand the nature of the marriage contract and the duties and responsibilities it creates.

663. **Consanguinity restrictions**. Incestuous marriages between persons closely related by blood or by marriage have been said to violate public policy. See Catalano v. Catalano, 170 A.2d 726 (Conn. 1961). Marriages between close blood relatives, such as brothers and sisters, parents and children, grandparents and grandchildren, are universally prohibited by the states. In addition, uncle-niece and aunt-nephew marriages are also forbidden throughout the United States. One exception is Rhode Island, which permits Jews to marry within the degrees of consanguinity permitted by their religion. This has been interpreted to permit uncle-niece marriages. In Re Mays Estate, 114 N.E.2d 4 (Ct. App. N.Y. 1953).

Procedures for marriage

664. Within the constitutional framework described above, all states have procedures for the licensing, solemnization and registration and recording of

marriages. The purpose of these statutes is to clarify the status of parties who live together as man and wife and to provide concrete evidence of the marriage. Reaves v. Reaves, 82 P. 490 (1905). These procedures, which require the parties voluntarily to take the necessary steps to affirm their desire to marry, also ensure that marriages are not entered into without the free and full consent of both parties. There is a difference of opinion among the states as to the effect of non-compliance with these statutes. Some states follow the rule that failure to follow a particular requirement does not invalidate the marriage unless the statute expressly so states or unless so many formalities are disregarded that there is, in effect, no ceremonial marriage at all. See Carabetta v. Carabetta, 438 A.2d 109 (Conn. 1980). Other states hold that failure to fulfil a particular requirement may render the marriage invalid. Henderson v. Henderson, 87 A.2d 403 (Md. 1952).

665. **Blood tests**. Most states require a blood test as a prerequisite to the issuance of a marriage licence. The tests are generally to be taken from both parties, and results are presented to the authority issuing the licence. Most statutes require that in order for the licence to be issued, the parties must be free of certain sexually-transmitted or other communicable diseases. Failure to comply with this requirement generally does not invalidate the marriage, although it may subject the parties and the issuing authority to penalties.

666. **Waiting periods**. In an effort to protect against hasty or ill-advised marriages, most states now require some form of waiting period. These typically last a maximum of 30 days either between the blood test and the issuance of a licence or from the issuance of the licence and the actual ceremony. Failure to comply with this requirement generally will not invalidate the marriage if it is the only defect.

667. **Celebration or solemnization**. The individual state legislatures have the authority to set qualifications and licensing requirements for those persons who are permitted to legally perform marriage ceremonies. In most states, no particular form of ceremony is prescribed as long as the parties declare their intention in the presence of the person solemnizing the marriage. Most states permit the wedding to be performed by either a clergyman or by a justice of the peace or other judicial officer. Generally, performance of a marriage by an unauthorized person does not render the marriage void unless such is expressly declared by the statute.

668. **Common-law marriage**. Common-law marriage is a non-ceremonial or informal marriage by agreement, entered into by a man and woman having capacity to marry, ordinarily without compliance with statutory formalities. Less than one fourth of the states still recognize common-law marriages. In addition to capacity and an agreement, most jurisdictions require some act of consummation, such as cohabitation, to make the common-law marriage valid. Some courts also require proof that the parties held themselves out to the world as husband and wife or that they were thought of as husband and wife in the community in which they lived. In those states that continue to recognize common-law marriages, the marriage is considered just as valid as those contracted in full compliance with the statutory requirements.

Status during marriage

669. Until the 1960s, U.S. law generally recognized traditional roles for men and women. The husband was viewed as the provider of the family, charged with meeting the family's needs through work, investments or other activities. Since then, however, societal changes in the United States have radically altered this approach. Several states have enacted laws providing that the duty of support rests equally upon husband and wife and should be shared equally in proportion to their individual abilities. See, e.g., West's Cal. Civ. Code Ann. section 5100 (1983); Conn. Gen. Stat. Ann. section 46b-37 (1986). In 1978, the Supreme Court invalidated a state law that authorized alimony payments only for wives as a violation of the Equal Protection clause of the Fourteenth Amendment. Orr v. Orr, 440 U.S. 268 (1979). In some states which have constitutional provisions forbidding the denial or abridgment of rights on account of sex, it has been held that it is a form of sexual discrimination to impose the duty of support solely on husbands. See, e.g., Rand v. Rand, 374 A.2d 900 (1977); Henderson v. Henderson, 327 A.2d 60 (1974).

670. In addition, a number of states have enacted community property laws which treat marriage as a joint enterprise between the husband and the wife. The philosophy of these community property states is that earnings by each spouse during marriage should be owned equally by both spouses. The profits or acquisitions of those earnings are also owned equally. Property acquisitions by gift, bequest, or devise, and property acquired before marriage are considered separate property. In some community property states, when a marriage ends in divorce, all community property must be divided equally. Other community property states give the court discretion to divide community property equitably. Community property states allow each spouse to specify in his or her will how his or her half-share of the property should be disposed of at death. If a spouse in a community property state dies intestate (without a will), some states provide that the decedent's half of the property passes to the surviving spouse. In other states, the decedent's half passes to his or her heirs. Nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) have community property laws.

671. At early common law, wives acquired "dower" at the time of their marriage. Dower was a life-estate in one third of each piece of the husband's qualifying real property. If a wife survived her husband, she was entitled to this third. Dower could only be released by the wife's consent. In those few states that still recognize dower, both the husband and wife must sign any deed in order to release dower. "Courtesy" was a similar right of husbands to their wives' real property if the wife died before the husband. Virtually all states now have statutes that ensure that surviving spouses will inherit some share of the decedent spouse's estate. Even where a will includes no provision for the surviving spouse, some states will allow the surviving spouse to renounce the will and take a statutorily defined share of the estate, usually one third to one half. See, e.g., Ill. Rev. Stat., ch. 110 1/2, sections 2-8(a)(1978). Section 2-102 of the Uniform Probate Code provides for inheritance when a spouse dies intestate. If there are no surviving children or parents of the decedent spouse, the surviving spouse inherits the entire estate. If there are surviving children or parents, the

Code awards the surviving spouse an initial portion of the estate and then directs that half of the remainder of the estate go to the surviving spouse and half to the other heirs.

672. Equal rights of spouses. Title I of the Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406, 88 Stat 829 (1974), helps to ensure the equality of rights for spouses. ERISA, which protects the rights of pension plan participants, generally requires that pension benefits be paid in the form of a joint and survivor annuity unless the participant's spouse consents to a different form of payment or unless the plan otherwise protects the interests of the spouse. The joint and survivor annuity guarantees that a portion of the participant's benefit will go to his or her surviving spouse.

673. ERISA also generally prohibits a plan participant from assigning his or her benefits to a third party. An exception is provided upon dissolution of the marriage. In such a case, plan benefits may be used to provide child support, alimony payments, or marital property rights to a plan participant's spouse, former spouse, child or other dependant.

The parent-child relationship

674. U.S. courts have recognized the primacy of the parent's role in child rearing. In particular, courts generally give wide discretion to parental decisions over such matters as the child's education, health care and religious upbringing. According to the Supreme Court, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder ... And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter". Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

675. Despite these broad parental rights, there are certain areas in which the states have legitimate interests. For example, every state has laws which require that children be sent to school between the ages of 6 and 16. See e.g., Ala. Code section 16-28-1 (1985); Miss. Code section 37-13-91 (1990); and Va. Code section 22.1-254 (1993). However, while the state may require that a child attend school, it will not make decisions on where the child attends school or whether the child receives a public or a private school education. In addition, where an intact family has a disagreement over the course of a child's education, the courts have been reluctant to step in and break the deadlock. See, e.g., Kilgrow v. Kilgrow, 107 So.2d 885 (Ala. 1958).

676. Similarly, in the area of medical care, it is generally the responsibility of parents to determine whether and what type of care is to be provided. However, many states have given minors the right to consent to limited treatment without parental consent. See Or. Rev. Stat. section 109.640 (1990) (minor may receive birth control information; minors 15 and older may consent to treatment). Moreover, the states have been willing to intervene to require medical treatment in certain cases in which parents have declined treatment on the basis of religious beliefs. See Jehovah's Witnesses in the State of Wash. v. King County Hospital Unit No. 1, 278 F. Supp. 488

(W.D. Wash. 1967), aff'd, 390 U.S. 598 (1968) (U.S. Supreme Court refused to enjoin the giving of blood transfusions to Jehovah's Witnesses. It upheld the statutes that empowered judges to order the transfusions since the procedure is both safe and necessary in many cases).

"Extended" families

677. Categories of both "relatives" (including relatives by marriage) and "dependants" (persons forming part of the household or receiving a percentage of their support) are recognized under U.S. law for various purposes such as entitlement to benefits and income taxation. These relationships do not, however, generally constitute defined legal relationships with fixed rights and obligations akin to the relationships among spouses, parents, and children.

Termination of the marital relationship

678. Traditionally, divorce was only available upon a showing of one of several fault-based grounds such as adultery, desertion, or cruelty. Under the traditional view, if the conduct that formed the basis of the claim for divorce did not fit into one of the statutory categories, a court could deny the request for a divorce. Today, every state grants "no-fault" divorces. Most states provide for both a no-fault basis and a fault basis for dissolving marriages. In about one third of the states, a no-fault divorce is not simply an alternative, but the only basis for divorce. State statutes frequently allow for a no-fault divorce when there has been an "irretrievable breakdown of the marriage", "irremediable breakdown of the marriage", or "irreconcilable differences". See, e.g., Alaska Stat. section 25.24.050 (1991) (incompatibility of temperament causing the irremediable breakdown of the marriage on joint petition); Arizona Rev. Stat. sections 25-312, 25-316 (1991) (marriage is irretrievably broken); West's Cal. Civ. Code Ann. sections 4506, 4507 (1983) (irreconcilable differences which have caused irremediable breakdown of the marriage); Colo. Rev. Stat. sections 41-10-106, 41-10-110 (1989) (marriage is irretrievably broken); Fla. Stat. Ann. section 61.052 (1985) marriage is irretrievably broken); Ky. Rev. Stat. section 403.170 (1990) (marriage is irretrievably broken); Miss. Code section 93-5-2 (Supp. 1986) (irreconcilable differences if the parties file a joint bill and separation agreement); N.H. Rev. Stat. Ann. section 458:7-a (1992) (irreconcilable differences causing irremediable breakdown of marriage); Tenn. Code Ann. section 36-4-101(11) (1984) (irreconcilable differences between the parties).

679. Where a state provides both a fault and no-fault option, individuals may choose to pursue a "fault" divorce to circumvent an otherwise mandatory period for spouses to live separately. Individuals may also prefer certain economic consequences of a fault divorce. The increased use of no-fault divorces has allowed for consensual divorces (where previously one spouse had to divorce the other) and for unilateral divorces (where only one spouse wants to divorce).

680. **Alimony and support**. U.S. courts have traditionally followed the English practice of awarding alimony as an incident to a divorce proceeding. This practice arose out of a recognition of the duty of a husband to support

his mate and of the control that the husband typically maintained over his wife's assets during the course of the marriage. Also, since divorce was typically fault-based, many courts awarded alimony as a recognition that the payer spouse was in some way at fault. However, as noted above, with the rise of women in the workforce, these traditional arguments have less merit and many courts are today awarding alimony only in small amounts or for limited periods to help a spouse adjust to being on his or her own or to restart a career. In making these determinations, most courts operate on a case-by-case basis taking into consideration such factors as the relative incomes of the parties, their ages, their health, future employment prospects and the standard of living to which they are accustomed.

681. Although as a practical matter alimony is most often awarded to the wife, most states provide by statute that alimony may be awarded to either spouse. These statutes are the natural outgrowth of the U.S. Supreme Court's decision in Orr v. Orr, 440 U.S. 268 (1979), which invalidated an Alabama statute placing the burden of alimony only upon the husband.

682. **Custody and visitation**. With the recognition of constitutionally based doctrines of gender equality, both mothers and fathers are now considered equal candidates for custody of minor children in the event of divorce. Fathers increasingly seek to obtain custody of their children, either exclusively or on a shared or joint basis. As a practical matter, however, mothers tend to receive custody in the large majority of cases.

683. All states have adopted the "best interests of the child" standard in deciding custody matters between two biological parents. See, e.g., In re Marriage of Ellerbrook, 377 N.W.2d 257 (Iowa App. 1985); Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985). Courts typically consider a number of factors in determining what is in the child's best interests. These factors include a presumption that the child should be placed with the parent, whether father or mother, who was the primary caretaker before the divorce. Courts also include factors such as the relationship that each parent has with the child, and, depending upon the child's age, the child's preference. Joint custody is now an option in all states. In many states joint custody is the presumed or preferred custody resolution. What joint custody entails, however, varies from case to case and may mean the children actually live a few days each week with each parent, or may mean simply that the parents share in decision-making.

684. One ongoing problem in custody disputes has been the issuance of conflicting custody orders by different states. This practice has allowed parents to "forum shop" to find a court willing to award them custody. The Uniform Child Custody Jurisdiction Act (UCCJA), adopted by all 50 states, and the federal Parental Kidnapping Prevention Act (PKPA), Pub. L. No. 96-611, 94 Stat. 3568 (1980), 27 U.S. section 1738A, have helped to ensure that states honour custody orders by another state. The PKPA requires states to give full faith and credit to custody orders by another state rendered within the principles of the UCCJA.

685. The only area where the "best interests of the child" standard is not followed is in custody disputes between a biological parent and a third party. In these cases, the courts have recognized the constitutional rights

of biological parents to retain custody over a third party. Unless a parent is found to be unfit, the courts will not terminate parental rights simply on an assertion that a third party has a superior ability to meet the child's interests. See DeBoer v. Schmidt, 442 Mich. 648, 502 N.W.2d 649 (1993) (refusing standing or jurisdiction in Michigan courts for couple attempting adoption where Iowa courts had ruled in favour of putative father).
Two evolving issues remain. First, with regard to the rights of putative fathers, where the father has not been involved in the care of the child, courts may terminate parental rights. Lehr v. Robertson, 463 U.S. 248 (1983) (denying putative father rights where he failed to comply with New York State registration requirements). Second, where the mother transfers custody, often to a relative, and then seeks to reverse that decision, courts have ordered a "best interests of the child" hearing.

686. Abduction of children by their parents or guardians is a problem that sometimes arises in the context of child custody disputes. All states are now parties to the Uniform Child Custody Jurisdiction Act, which is designed to prevent abductions by establishing uniform jurisdictional standards for child custody determinations. These goals have been further implemented by the PKPA. Internationally, the United States is party to the Hague Convention on Civil Aspects of International Child Abduction, and has taken legislative steps to ensure that the provisions of the Convention are binding in U.S. courts.

687. **Child support and enforcement of decrees.** It is well settled that both parents are responsible for the support of their children. Thus, in making child support orders, courts normally take into consideration the property and income of both parents. This does not mean that both parents are required to contribute equally. Rather, they are expected to contribute in proportion to the resources each possesses. See Silva v. Silva, 400 N.C. 2d 1330 (1980); Henderson v. Levkold, 657 P.2d 125 (1983). In determining the amount of support to be awarded, courts normally take into consideration such factors as the financial resources and needs of the child, the standard of living enjoyed by the child during the marriage, the child's educational and medical needs, and finally, the financial needs and resources of the parents.

688. All states provide for the enforcement of child support through both civil and criminal procedures. Failure to provide support for a minor child is a criminal offence in all of the states even without a court order for support. Where there is an order, state law provides such traditional measures as contempt of court and other enforcement procedures applicable to any civil judgment. Interstate enforcement is facilitated by use of the Uniform Reciprocal Enforcement of Support Act, a law enacted by all of the states, which provides a mechanism for public officials to enforce orders made in one state against the obligated party in another state.

689. In recognition of the need to improve child support enforcement by the states both interstate and within each state, the United States Congress passed in 1975 comprehensive legislation (Title IV-D of the Social Security Act [IV-D Programme] - 42 U.S.C. sections 651-55) establishing a mandatory requirement for the states to set up a state agency to locate obligors, establish paternity, and enforce child support. The legislation also established on the federal level an Office of Child Support Enforcement in the

Department of Health and Human Services to regulate and evaluate the state programmes and to operate a federal Parent Locator Service. The enforcement services under this programme are available to all children. Since 1975, Congress has enacted a number of measures, notably in 1984 and 1988, to improve and strengthen the enforcement programme and to require the states to establish child support guidelines, and to provide efficient enforcement procedures such as liens, capture of tax refunds for overdue support, automatic wage withholding, and direct interstate wage withholding.

690. Because interstate enforcement remained a major problem, Congress also established a commission to review the problem and make recommendations. The commission report recommended numerous changes in the procedures for handling and enforcing interstate cases, most of which have been introduced in legislation now pending in Congress. During the same time period, the National Conference of Commissioners on Uniform State Laws reviewed the state uniform act, and developed a new interstate enforcement act - The Uniform Interstate Family Support Act - to improve interstate enforcement. Congress has also made failure to provide support a crime in some interstate cases.

691. In spite of these legal safeguards and extensive programmes, however, it is clear that more needs to be done to address the problem of inadequate child support in the United States.

Other measures of protection

692. In addition to the protections outlined above, the United States provides a number of programmes to assist families. While these programmes do not exist as a matter of right, they are designed to assist in areas in which there are special needs. Many of these programmes are operated in concert with the private sector. Other programmes aimed particularly at maternal and child welfare are discussed in connection with article 24.

693. In February 1993, the United States enacted the Family and Medical Leave Act of 1993 (FMLA), Pub. L. 103-3, 107 Stat. 6. "The F.M.L.A. - like similar state laws and employer policies - is intended to promote a healthier balance between work and family responsibilities, ensuring that family development and cohesiveness are encouraged by this nation's public policy". 58 F.R. 31,1794. The FMLA, which covers private employers with 50 or more employees and most public employers, including the federal government, entitles qualified employees to up to 12 weeks of unpaid leave per 12-month period for the birth or adoption of a child, to care for a spouse or immediate family member with a serious health condition or when the employee is unable to work because of a serious health condition. Covered employers are required to maintain any pre-existing health insurance during the leave period and to reinstate the employee in the same or an equivalent job following the end of the leave.

694. The FMLA, which went into effect on 5 August 1993, is administered largely by the U.S. Department of Labor's Employment Standards Administration. The U.S. Office of Personnel Management, however, administers Title II of the Act, as this deals with most federal employees.

695. Under current law, the United States also has numerous programmes for protecting the economic viability of families during times of job loss and for

training workers for new employment opportunities. These programmes include Unemployment Insurance, the Economic Dislocation and Worker Adjustment Assistance Act (which amended Title III of the Job Training Partnership Act), the Defense Conversion Adjustment Programme, the Defense Diversification Programme, the Clean Air Employment Transition Assistance Programme, and the Trade Adjustment Assistance Programme. These programmes provide retraining, placement, income support and other support services to workers who are dislocated for a variety of reasons. In addition, the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. sections 11441 et seq., authorizes the Secretary of Labor to make grants for job training demonstration projects for homeless individuals.

Women and family law

696. The development and enforcement of women's legal rights within the family have been a major area of attention in recent years. Over the past two decades, domestic violence including rape, incest and battering, child custody, child support, and marriage and divorce law generally have all been redefined in the U.S. as women's experiences have been articulated in the legal and policy arena. Domestic violence law has been fundamentally transformed as more women have defined physical, sexual and emotional violence by male partners both as unacceptable and as deserving a legal remedy. In addition to prosecution for relevant criminal offences such as assault, many states currently provide more specialized remedies such as eviction of the aggressor and civil protection orders that trigger criminal penalties when violated. In addition, mandatory arrest law, training programmes for police, victims assistance programmes in prosecutors' offices and new prosecutorial procedures that place the burden of the decision of prosecuting on the government rather than on the victim have all received support. One of the more controversial areas remains marital rape. Some states do not by criminal statute specifically prohibit rape within an ongoing marriage. Others require evidence of significant additional violence at the time of the alleged rape.

Article 24 - Protection of children

Non-discrimination

697. Children in the United States are entitled to constitutional and statutory protections against discrimination which are described elsewhere in this report. As described in connection with article 2, the Fifth and Fourteenth Amendments to the Constitution, together with numerous federal and state statutes, ensure that all U.S. citizens are protected against discrimination on the basis of race, colour, sex, language, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In the context of equal protection doctrine generally, U.S. law provides special measures of protection aimed at preventing discrimination against children.

698. **Education**. Principles of non-discrimination have been enforced with special vigour in the field of education. It is notable that the seminal Supreme Court decision on equal protection in the United States, Brown v. Board of Education, 347 U.S. 483 (1954), concerned the education rights of children. In that case, the Supreme Court ruled that racial segregation in

public school education was unconstitutional under the Equal Protection clause of the Fourteenth Amendment. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, colour, or national origin in programmes and activities receiving federal financial assistance. 42 U.S.C. section 2000d. In the years since Brown, courts and legislators have articulated a host of other educational protections for children. For example, it is now illegal for schools to discriminate against children on the basis of their status as illegal aliens, Plyer v. Doe, 457 U.S. 202 (1982); on the basis of sex, Title IX of the Education Amendments of 1972, 20 U.S.C. sections 1681 et seq.; on the basis of language status, Lau v. Nichols, 414 U.S. 563 (1974); on the basis of disability, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, Individuals with Disabilities Act, 20 U.S.C. sections 1400 et seq., and the Americans with Disabilities Act; or on the basis of homelessness, McKinney Homeless Assistance Act, Pub. L. No. 100-77 (1987), 101 Stat. 482, as amended, 42 U.S.C. section 11431.

699. **Children born outside of marriage**. The U.S. Supreme Court has adopted a standard of heightened scrutiny in reviewing instances of discrimination against children born outside of marriage. In the important area of child support, the Court has held that a state's failure to accord full support rights to such children constitutes a violation of equal protection. Gomez v. Perez, 409 U.S. 535 (1978).

700. More recently, the Court has held that a six-year limit on paternity and support actions denied illegitimate children equal protection. Clark v. Jeter, 486 U.S. 456 (1988). Particularly in the areas of inheritance and Social Security benefits, however, the Court has upheld the state's interest in facilitating property succession and administering the Social Security programme despite unequal treatment of illegitimates. See Lalli v. Lalli, 439 U.S. 259 (1978) (upholding a statute restricting inheritance by illegitimates from father's estate to instances where a court of competent jurisdiction, during the father's lifetime, had entered an order declaring paternity); Mathews v. Lucas, 427 U.S. 495 (1976) (upholding Social Security benefits awarded only where illegitimate child met one of "presumptions" of dependence on deceased parent or where child was living with or being supported by parent at parent's death).

701. **Non-citizen children**. Similarly, the Supreme Court has applied heightened scrutiny in adjudicating the equal protection rights of alien children. The Court has held, for example, that alien children have a constitutional right to public school education in the United States, whether or not they are legally documented aliens. Plyer v. Doe, 457 U.S. 202 (1982). The Court has also found that aliens have a right to equal access to educational assistance benefits. Nyquist v. Mauclet, 432 U.S. 1 (1977).

702. **Disabled children**. Disabled children in the United States are protected against discrimination by the Americans with Disabilities Act of 1990, which expanded the guarantees of the Civil Rights Act of 1964 to millions of persons with physical and mental handicaps. In particular, disabled children benefit from entitlements to access to public accommodation, including recreational facilities, restaurants, retail facilities and transportation. As noted above, children with disabilities are fully guaranteed the right to equal educational opportunities in the United States. See 20 U.S.C.

section 1400 et seq. (Individuals with Disabilities Education Act, IDEA). Also, disabled children are protected by section 504 of the Rehabilitation Act of 1973, which prohibits discrimination in federally funded programmes on the basis of disability or perceived disability.

Primary responsibility

703. **Parental responsibility**. Parents bear the primary responsibility for the protection and upbringing of children in the United States. As noted above in connection with article 23, U.S. courts have long recognized the rights of parents to raise their children free from government intervention: "The history and culture of Western civilization reflect a strong tradition of parental concern for the upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition". Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Under U.S. law, parents have both the right and the duty to prepare their children for adulthood: "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations". Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

704. **Child custody**. As discussed under article 23, all states adhere to the "best interests of the child" doctrine in determining the custody of children between biological parents. As a Kansas court indicated, "without question, the paramount concern of courts in child custody proceedings is the welfare of the child .... [W]hen a controversy arises as to the custody of a minor child, the primary question to be determined by the court is what is for the best interest of the child". Chapsky v. Wood, 26 Kan. 650 (1881). Since then, the "best interests" doctrine has been articulated in the statutes or case law of all the states and in the Uniform Child Custody Jurisdiction Act.

705. **Adoption**. Adoption is a legal process which establishes a parent-child relationship between individuals who are not each other's biological parent or child. In the United States, adoptions are regulated primarily by state law. Although the states have yet to adopt uniform guidelines for adoptions, there are certain characteristics common to all state adoption laws. First, adoption is permitted only after a court has been satisfied that the biological parents have given voluntary and informed consent, or that there are other appropriate grounds for waiver of such consent. Second, before an adoption is approved, a court must find that the child is being placed with suitable adoptive parents and that the proposed adoptive relationship is in the best interests of the child. Third, adoption in the United States is not a bargained-for exchange. Although parents may pay agencies and other professionals for certain adoption-related expenses, they are prohibited from "purchasing" children for adoption. Finally, adoption constitutes a permanent substitute for the prior legal relationship between the child and his or her biological parents. The federal government plays a limited role in providing financial support for families of adopted children. For example, under the Adoption Assistance and Child Welfare Act, 42 U.S.C. sections 670 et seq., the government provides reimbursements to states for financial and other assistance given to families adopting children with "special needs".

706. At present, a Uniform Adoption Act is being drafted which would establish common guidelines for handling adoptions among the various states. In addition, the U.S. Government has participated in the effort by the Hague Conference on Private International Law to develop an international covenant on inter-country adoptions and is actively considering prompt ratification.

Oversight and support of the primary care-giver

707. Parental role. As discussed above, states require parents to provide support for their minor children to the extent of their financial abilities. In setting out the requirements for child support, states are prohibited from discriminating against children on the basis of their sex, legitimacy, or adoptive status. The only exception to this rule is in the area of inheritance by children born out of wedlock, as discussed above. Failure of parents to provide adequate support to children within their care can lead to civil abuse or neglect proceedings and removal of the child from parental care. Mechanisms for enforcement of child support obligations by non-custodial parents in case of divorce are discussed under article 23.

708. Financial support programmes. The federal government administers a number of social programmes designed to provide financial support for children whose parents cannot afford to bear the full burden of child support. Aid for Families with Dependent Children (AFDC), 42 U.S.C. sections 601 et seq., is the principal support programme for poor families. Poor families with children are also eligible for the Earned Income Credit (EIC), 26 U.S.C. section 32, a federal tax credit which offsets social security taxes and supplements wages for poor families with children. In addition, the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988), provides federal support for state job training programmes for families receiving AFDC payments.

709. Children in the United States also benefit from more general social insurance programmes. Each child of a retired, disabled or deceased insured wage earner is entitled to receive social security benefits through the age of 18 (or 19 if the child is still enrolled full-time in secondary school). As of 1987, 2.6 million minor children were direct beneficiaries of social security, and millions more were indirect beneficiaries through their parents or guardians. In addition, children in the United States benefit from other social insurance programmes such as unemployment insurance and workers compensation.

710. Foster care. The foster care system in the United States provides care and financial assistance for children whose parents are either unable or unwilling to care for them. The system is administered by state and local child welfare agencies. Most foster children are placed in individual foster homes or in group homes where they are cared for by foster parents or group home staff. When homes are unavailable, children may be placed in institutions; however, the use of institutional child care is limited under both federal and state law. See, e.g., West's Calif. Welf. & Instit. Code sections 206, 207.1, 361.2; 42 U.S.C. section 672(c)(2).

711. Many children in the United States are brought into the foster care system through involuntary removal from their parents by child protective

services workers. Others are placed there voluntarily by parents who need assistance in child care. Those children who are permanently separated from their parents are cared for through adoption, guardianship, or long-term foster care. In such cases, both federal and states laws encourage the placement of children in permanent homes as soon as possible.

712. Foster care is funded primarily by the states through direct grants to care-givers. The federal government provides additional funding through the Adoption Assistance and Child Welfare Act, 42 U.S.C. sections 670 et seq. As a prerequisite to funding, the Act sets out minimum requirements for state foster care agencies. These include case plans, regular case reviews, minimum standards for foster homes, mandated reporting of abuse by out-of-home care-givers, and procedural protections for parent-child visitation and changes in placement.

713. **Child abuse**. The federal government and the states have devoted considerable resources to combating the problem of child abuse in the United States. Each state now has a reporting statute which requires professionals working with children, such as teachers and doctors, to report evidence of child abuse and neglect to designated law-enforcement or child protection authorities. Most statutes impose a minor criminal penalty for failure to report. Upon receiving an abuse report, a state enforcement agency is required to investigate to determine whether there is a basis for the report. In extreme cases, U.S. law permits state authorities to take abused children into emergency protective custody.

714. Every state has a juvenile or family court with jurisdiction over child abuse cases. Proceedings are commenced by a state agency filing a petition alleging that a child has been abused and is in need of protection. Upon an affirmative determination of abuse or neglect, the court has a range of available remedies, including protective orders, supervision of parents, awarding temporary custody to foster parents or the state, requiring medical or psychiatric treatment for either the parents or the child, and in extreme cases, termination of parental rights.

Other special measures of protection for children

715. **Minority**. The common law in the United States traditionally imposed both privileges and disabilities on persons under age. The purpose was to protect the child at a time when he or she lacked the capacity to exercise good judgment. This purpose underlies most of the legal privileges and disabilities imposed on minors, such as the privilege to disaffirm contracts or the disability to consume alcohol. Until the 1970s, the legal age of majority in the United States for most purposes was 21. Since then, all but five states have reduced the age to 18. Many of those states which have reduced the age of majority still maintain restrictions, such as prohibitions on purchasing liquor, on persons up to the age of 21. The Twenty-Sixth Amendment to the Constitution now ensures that all persons 18 years of age have the right to vote in the United States.

716. **Ability to contract**. Minors in the United States, while they may enter into contracts and enforce them, also have the right to disaffirm their contracts, and thereby avoid liability, at any time before reaching majority

or within a reasonable time thereafter. Several states have modified this doctrine to allow children to enter fully binding contracts for the purchase of necessaries, which are defined as goods and services needed for the child's support. These include food, clothing, housing, medical care, legal services, and in some cases an automobile.

717. Child labour laws. The federal Fair Labor Standards Act (FLSA) establishes national minimum wage, overtime, record-keeping and child labour standards affecting more than 80 million full- and part-time workers in both the public and private sectors. 29 U.S.C. sections 201 et seq. It applies to workers engaged in interstate commerce, the production of goods for interstate commerce or in activities closely related and directly essential to such commerce. The FLSA also applies to all employees of certain enterprises including business enterprises with more than $500,000 in annual volume of business.

718. The FLSA's child labour provisions are designed to protect the educational opportunities of younger minors and to prevent employment in jobs and under conditions detrimental to the health or well-being of all minors. These provisions include certain restrictions on occupations and hours of work for youth under 16 years of age in non-agricultural work. They also restrict to non-school hours the working hours of children aged 12 through 14 employed in agriculture under specific conditions. In addition, the FLSA prohibits employment of minors under age 16 in farm occupations declared by the Secretary of Labor to be hazardous for minors to perform; similarly, minors under age 18 in non-agriculture work may not be employed in occupations declared hazardous by the Secretary. Violators may be charged in the form of administrative civil money penalties of up to $10,000 for each violation and, in certain circumstances, may be subject to criminal penalties. The Secretary of Labor may also seek injunctions against violators in federal district courts.

719. In addition to federal child labour statutes, most states have child labour laws designed to protect young workers.

720. The U.S. Labor Department's Employment Standards Administration, Wage and Hour Division (WH), enforces the FLSA child labour provisions. In fiscal year 1993, WH assessed employers over $8.2 million in civil money penalty fines and found over 10,000 minors illegally employed.

721. Armed conflict. Children in the United States are not permitted to participate in armed conflict. The only exception to this policy is for persons not less than 17 years of age who have obtained written parental consent. In practice, the Department of Defense ensures that individuals under the age of 18 are not stationed in combat situations. See Regular Army and Army Reserve Enlistment Programme, Army Regulation 601-210, Headquarters, Department of the Army, 1 December 1988, Chapter 2.

722. Drugs. The abuse of narcotic and psychotropic drugs by children is a serious problem in the United States. The production, sale, and use of such drugs is illegal in every state, and several states have taken steps to target specifically the sale of drugs to children, for example, by increasing the penalties for drug sales in the proximity of schools. Education is another

key aspect of the war on drug abuse by children, and most states now require that public school students be exposed to drug education curricula at several stages in their education. Perhaps the weakest link in the war on drugs is in funding for rehabilitative services. At present, many American children who are already addicted to drugs do not have access to meaningful support and assistance in curing themselves of their habits.

723. **Sexual exploitation of children**. U.S. federal and state law contain comprehensive protections against sexual exploitation of children. Most cases concern sexual contacts or molestation, which are criminal acts in all states. Child prostitution is also illegal in every state, and in most states, criminal liability extends to any person participating in or profiting from the acts of a child prostitute. Statutory rape laws have also been applied in the context of child prostitution. The problem of sexual abuse of children in the home is addressed through state child abuse laws. In addition, the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. sections 5101 et seq., requires states receiving federal funding to include "sexual exploitation" in their definitions of reportable child abuse. Finally, child pornography is now illegal under both federal and state law. In a recent decision, the Supreme Court ruled that the government has a compelling interest in the protection of victims of child pornography, one which overrides the free speech interests of pornographers. Osborne v. Ohio, 495 U.S. 103 (1990).

724. **Trafficking in children**. Trafficking in children is illegal under the Thirteenth Amendment to the Constitution, which prohibits all forms of slavery and involuntary servitude, except as punishment for crime. This constitutional prohibition is supplemented by numerous federal and state statutes. The Mann Act, for example, prohibits trafficking in individuals for purposes of prostitution and imposes heightened penalties in the case of children. See 18 U.S.C. sections 2421 et seq.

Education

725. All children in the United States are entitled, through the laws of each state, to universal, public, free primary and secondary school education. Each state has a compulsory education statute requiring children between certain ages (typically 6 through 16 years old) to attend primary and secondary school. In addition, the constitutions of all 50 states contain provisions supportive of education. See, e.g., N.Y. Const. art. XI section 1. Although the federal Constitution does not expressly provide for a right to education, the U.S. Supreme Court has suggested that children have an implied right to "some identifiable quantum of education" sufficient to provide the "basic minimum skills" needed to enjoy the freedom of speech and to participate in the political process. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 36 (1973). The Headstart programme, 42 U.S.C. sections 9801 et seq., provides special pre-school education programmes for qualifying children. The Individuals with Disabilities Education Act, 20 U.S.C. sections 1400 et seq. guarantees a free appropriate public education for children with disabilities.

Health care

726. The federal government administers a number of health care programmes which are designed to ensure that all children in the U.S. receive adequate care, free of charge if necessary.

727. The primary financing mechanism for publicly funded health care in the United States is the Medicaid insurance programme, 42 U.S.C. sections 1396 et seq. Operated by the states under broad federal guidelines, Medicaid covers most, but not all, low-income pregnant women, children, and caretaker relatives of children. Medicaid has been a vehicle for improving prenatal care and reducing infant mortality. In addition, under the preventive component of Medicaid - the Early and Periodic Screening Diagnosis and Treatment (EPSDT) programme - federal law requires the states to provide a package of preventive, screening, diagnostic and follow-up services to children. The federal government has set a target whereby 8 out of 10 eligible children must receive medical screening by 1995. As of 1990, however, only about one half of poor children older than six received any Medicaid services at all.

728. There are three principal programmes for delivery of public medical services in the United States. The Title V Maternal and Child Health Block Grant programme makes federal funds available to states to "provide and assure mothers and children (in particular those with low income or with limited availability of health services) access to quality maternal and child health services". Most states combine these federal grants with state revenue funds to deliver services at the local level. Although it has suffered from funding constraints, Title V represents a commitment on the part of the United States to provide primary health care to all American children free of charge if necessary.

729. The second initiative is the Community and Migrant Health Centre programme, which finances community health centres in medically underserved communities. Over 2,000 health care sites, run by approximately 600 public and private non-profit entities, provide comprehensive primary care to the target population in all states except Wyoming and in Puerto Rico and the District of Columbia. Of the more than 5 million patients served each year, two thirds are women of child-bearing age and children.

730. The third principal programme is the National Health Service Corps, which sends individual physicians to areas in need of better health care, primarily inner cities and rural areas.

731. Another federal health care programme is the Title X Family Planning programme. Finally, one programme that contributes significantly to the well-being of women and children is the Supplemental Food Programme for Women, Infants and Children (WIC), 42 U.S.C. section 1786. This latter programme provides nutritious foods, nutrition education, and semi-annual physical exams to low-income, high-risk women and children under 5 years of age.

732. Immunization. One of the most important health services provided for children in the United States is immunization. Approximately one half of childhood vaccines administered in the U.S. are financed through the private

sector. The other half are financed through a combination of state funds and federal funds which are paid through the Childhood Immunization Program at the Centres for Disease Control. In spite of these funding efforts, however, there is need for improvement in the United States, as hundreds of thousands of American children still do not have adequate immunization. At present, largely as a result of inadequate health care delivery, only about one half of preschool-age children in the inner city are fully immunized. In 1993, Congress enacted a new childhood immunization programme under Medicaid (Pub. L. No. 103-66, 107 Stat. 312, section 13631).

733. **Services for disabled children**. Many of the publicly funded health care programmes described above provide special services for disabled children. For example, current law now requires that a minimum of 30 per cent of federal Title V funds be used for children with special health needs. With funding from Title V, states administer programmes for Children with Special Health Care Needs, which in recent years have broadened in scope to encompass, among others, children with AIDS or HIV infection, mental retardation and speech-lung-hearing disorders.

734. Disabled children also benefit from the 1989 Amendments to the Medicaid EPSDT programme. With full implementation of the Amendments, these children will be entitled to a full range of rehabilitation services including physical, occupational and speech therapy.

735. Under the Supplemental Security Income (SSI) programme, low-income individuals who are blind or disabled are provided with cash income payments from the federal government. Children are eligible if they are disabled and if their family income and resources fall below a certain level. As of the end of 1993, approximately 750,000 children, most with severe disabilities, receive SSI monthly cash payments.

736. In the area of education, the Individuals with Disabilities Education Act was promulgated to assist families in securing free and appropriate public education for disabled children. The Act also requires that the government provide disabled children with so-called "related services", which include education-related therapies and health services. These services are provided free of charge. As of 1990, approximately 4 million children received services from this programme.

737. Disabled children also benefit from the non-discrimination provisions of Section 504 of the Rehabilitation Act of 1973 and from the Americans with Disabilities Act of 1990, discussed under article 2.

Registration and identity

738. The United States does not have a system of national identification cards or registration. Rather, birth registration has traditionally been a state and local function in the United States. Every state requires the registration of every child born in the state. See e.g., Cal. [Health & Safety] Code section 10100 (1987) ("Each live birth shall be registered within 10 days following the date of the event."); Ariz. Rev. Stat. Ann. section 36-322; Ill. Stats. ch. 111 1/2, para. 73-12 (Vital Records Act). Birth certificates may be obtained as proof of citizenship or birth.

739. A number of courts have considered the issue of naming children. They have found that "parents have a common law right to give their child any name they wish, and that the Fourteenth Amendment protects this right from arbitrary state action". Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979). Courts have rejected state arguments for statutes limiting acceptable names for children, finding that administrative convenience is not a sufficient state interest to impair the right to name one's child. See Jech, 466 F. Supp. at 720; O'Brien v. Tilson, No. 79-463-CIV-5 (E.D.N.C. 2 October 1981) (memorandum finding that N.C.G.S. section 130-50(e) violated the plaintiff's constitutional rights); Sydney v. Pingree, No. 8208291-CIV-JAG (S.D. Fla. 17 December 1982) (order granting plaintiff's motion for summary judgement).

Nationality

740. Acquisition of U.S. citizenship is governed by the U.S. Constitution and by federal statute. The Fourteenth Amendment of the Constitution provides that "[a]ll persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States" regardless of the nationality of their parents. The Immigration and Nationality Act further provides that a child born abroad to a U.S. citizen parent (or parents) shall acquire U.S. citizenship at birth provided the U.S. citizen parent (or parents) complied with specified requirements for residency or physical presence in the U.S. prior to the child's birth. 8 U.S.C. section 1401. (Previous versions of this statute required that, in order to retain U.S. citizenship, the child reside or be physically present in the U.S. for a certain period of time before a certain age.) The Immigration and Nationality Act also permits and establishes requirements and procedures for acquisition of U.S. citizenship by naturalization. 8 U.S.C. sections 1421 et seq.

Article 25 - Access to the political system

741. The U.S. political system is open to all adult citizens without distinction as to gender, race, colour, ethnicity, wealth or property. Effective access to the political system is important not only as a right in and of itself, but as an additional guarantee of the respect for other human rights.

Voting

742. The right to vote is the principal mechanism for participating in the U.S. political system. The requirements for suffrage are determined primarily by state law, subject to limitations of the Constitution and other federal laws. Over the course of the nation's history, various amendments to the Constitution have marked the process toward universal suffrage. In particular, the Supreme Court's interpretations of the Equal Protection clause of the Fourteenth Amendment have expanded voting rights in a number of areas. The summary below sets out those respects in which suffrage has been expanded and those in which some limitations still remain.

743. **Gender**. The Nineteenth Amendment to the Constitution, ratified in 1920, guarantees women the right to vote in the United States. In many states, women had already been enfranchised prior to that date.

744. Race and colour. The Fifteenth Amendment to the Constitution, ratified in 1870 following the Civil War, prohibits the denial of voting rights "on account of race, colour, or previous condition of servitude". At the time it was first passed, however, the Fifteenth Amendment and legislation adopted to enforce it did not sufficiently ensure the full and permanent enfranchisement of African Americans in all states in practice. Through both physical and economic coercion supported by state legal systems, African Americans were still almost totally excluded from the political process of several southern states through the end of the nineteenth century.

745. During this century, African-Americans have won a number of Supreme Court victories in the area of voting rights. See, e.g., Guinn v. United States, 238 U.S. 347 (1915) (restricting franchise to those whose grandfathers were eligible to vote unconstitutional); Lane v. Wilson, 307 U.S. 268 (1939) ("The [15th] Amendment nullifies sophisticated as well as simple-minded modes of discrimination"); Terry v. Adams, 345 U.S. 461 (1953) (excluding African Americans from primaries unconstitutional); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redrawing boundaries of town to exclude African Americans unconstitutional). Further progress was made through Civil Rights Acts enacted by Congress in 1957, 1960, and 1964, and especially through the Voting Rights Act of 1965. See 42 U.S.C. sections 1971 and 1973 et seq. As a result, African Americans now enjoy the uninhibited right to vote in every part of the United States.

746. The Voting Rights Act authorizes the U.S. Attorney General and private parties to bring lawsuits to enforce the Fifteenth Amendment and bans the use of literacy tests and other devices which had been used to disqualify African-American voters. The courts subsequently determined that illiterate persons are entitled to receive assistance in marking their ballots, United States v. State of Mississippi, 256 F. Supp. 344 (S.D. Miss. 1966), and in 1982 Congress amended the Voting Rights Act to provide that illiterate persons (and those who require assistance because of blindness or disability) must be permitted to select their own helpers. 42 U.S.C. section 1973aa-6. As a safeguard, voters are not permitted to receive assistance from their employers or agents of their employers or from officers or agents of their unions. The assistance requirement applies to the voter registration process as well as to voting itself. Rules with respect to who could give assistance (e.g. poll workers, relatives, registered voters) had varied greatly from state to state.

747. In addition, the Voting Rights Act contains three specialized mechanisms that apply to certain problem areas through the year 2007:

(a) Federal registrars are authorized to conduct voter registration in areas in which local registrars refuse to register minority applicants, or make it difficult for them to register;

(b) Federal approval is required for changes in voting laws and practices, to prevent the implementation of new laws and practices aimed at continuing the disenfranchisement of minorities;

(c) Federal observers are authorized to monitor elections to assure that minority voters are permitted to vote and their votes are actually counted.

See 42 U.S.C. section 1973(a)(8). As a result of the enforcement of the Voting Rights Act and of the efforts of civil rights workers, African Americans in affected states now register to vote and vote at roughly the same rates as other citizens. Prior to the Voting Rights Act, for example, about 19 per cent of the African Americans of voting age in Alabama were registered to vote, 27 per cent in Georgia, 32 per cent in Louisiana, and 7 per cent in Mississippi. See United States Commission on Civil Rights, Political Participation, Appendix VII (Washington, D.C. 1968). At the time of the 1992 presidential election, 72 per cent of voting age African Americans in Alabama, 54 per cent in Georgia, 82 per cent in Louisiana, and 79 per cent in Mississippi reported they were registered to vote, compared to 68 per cent for all persons of voting age. See United States Bureau of the Census, Current Population Reports, P20-466, Voting and Registration in the Election of November 1992, Table 4 (Washington, D.C. 1993).

748. The U.S. Department of Justice and various private organizations remain vigilant to ensure that the voting rights of African Americans and of other minorities defined by race or colour are not denied or abridged. The U.S. Attorney General continues to bring lawsuits under the Voting Rights Act; to deny approval for discriminatory voting law changes; and to send federal observers to monitor elections. The need for Voting Rights Act enforcement generally has shifted from practices that deny the right to vote to those that abridge the right to vote, for example, by making it more difficult for African Americans or other minorities than for other persons to elect candidates of their choice to public office.

749. Ethnicity and language. The Voting Rights Act was amended in 1975 to ensure the protection of the voting rights of ethnic groups who speak languages other than English. These minorities include Mexican Americans living in Texas and other states of the Southwest and persons of Asian descent living throughout the country. The amendment requires that minority language information, materials, and assistance be provided to enable minority language citizens to participate in the electoral process on an equal basis with other citizens. It applies in jurisdictions with significant concentrations of minority language citizens (under the Act, Hispanics, Asian Americans, Alaska Natives and Native Americans), and expires in 2007, along with the other special provisions of the Voting Rights Act discussed above. The minority language provisions of the Voting Rights Act have since been extended by the Voting Rights Amendments of 1982 and the Voting Rights Language Assistance Act of 1992. See 42 U.S.C. sections 1973b(f) and 1973aa-1a.

750. The Fourteenth and Fifteenth Amendments were not, at the time of their ratifications, understood to enfranchise Native Americans. In 1924, however, Native Americans were declared by Congress to be citizens of the United States, and since then, they have enjoyed the same voting rights as other citizens. See Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948). See also Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975), aff'd, 429 U.S. 876 (1976) (Indians must be counted in the population base for the

creation of districting plans). Eskimos and Aleuts in Alaska and Native Hawaiians have been enfranchised since those two states achieved statehood in 1959.

751. **Property and wealth**. Early restrictions limiting the franchise to property owners were gradually eliminated during the eighteenth and nineteenth centuries. Under the Equal Protection clause of the Fourteenth Amendment, restricting the franchise to property owners is only permissible in elections for limited purpose quasi-governmental agencies such as water reclamation agencies. See Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973). The Supreme Court has severely limited such restrictions, holding, for example, that they are not permitted for school board elections. See Kramer v. Union Free School District, 395 U.S. 621 (1969).

752. Under the Twenty-Fourth Amendment to the Constitution and the Supreme Court's interpretation of the Equal Protection clause, the states may not require the payment of a "poll tax" (a fee per person or "head" tax) as a prerequisite to voting. See Harper v. State Board of Elections, 383 U.S. 663 (1966).

753. **Age**. The Twenty-Sixth Amendment, ratified in 1971, prohibits the states from excluding from the franchise anyone 18 years of age or older by reason of age. Previously the standard age for voting was 21. Where primary elections are held, those who are less than 18 but will become 18 by the date of the general election are frequently permitted to vote. States have the discretion to enfranchise those below the age of 18.

754. **Disability**. Voting by the blind and by the disabled has been further facilitated by the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. sections 1973ee et seq., and by the Americans with Disabilities Act of 1990, 42 U.S.C. sections 12131 et seq., which prohibits discrimination against disabled persons in all programmes of state and local governments.

755. **Residency and citizenship**. States and localities are generally permitted to exclude non-residents from voting in local elections; however, they do not have unlimited discretion to define the requirements of residency. For example, the U.S. Supreme Court has held that states may not, on residency grounds, exclude military personnel who have moved in from other states. Carrington v. Rash, 380 U.S. 89 (1965). States are further prohibited from denying the right to vote to residents of a federal enclave. Evans v. Cornman, 388 U.S. 419 (1970).

756. Those who, because of poverty or other problems, have no fixed address have generally been unable to register to vote because they cannot establish that they are residents of the jurisdiction in which they seek to vote. However, such restrictions may violate the Equal Protection clause of the Fourteenth Amendment. See Pitts v. Black, 608 F Supp. 696 (S.D.N.Y. 1984) (refusal to allow registration by those without traditional residences violates Equal Protection clause). Homeless persons in some jurisdictions are permitted to register using shelters as their addresses.

757. In general, states are permitted to impose residency requirements only for very limited periods justified on administrative grounds. See Marston v. Lewis, 410 U.S. 679 (1973) (50-day requirement upheld); but see Dunn v. Blumstein, 405 U.S. 330 (1973) (requirement that one be resident of the state for one year and of the county for three months was invalidated). Under the Voting Rights Act, as amended in 1970, durational residency requirements are not permitted in voting for President of the United States. 42 U.S.C. section 1973aa-1. Voters who move shortly before an election must be permitted to vote either in their new state or their old.

758. Citizenship. Under the laws of the various states, the right to vote is almost universally limited to citizens of the United States.

759. Party membership. Except where elections are held on a non-partisan basis, those elected to office usually are the nominees of political parties. Political parties use primary elections and conventions to select their nominees. In many states only those affiliated with a party in advance of the primary election day are permitted to vote in that party's primary. In other states, voters can decide at the polls in which party's primary to participate. Under current U.S. law, political parties may not arbitrarily limit access to membership. Thus, a state law that prohibited voters from changing party affiliation during the 23 months prior to a primary election was found unreasonably to restrict the right to vote and thus to violate the Equal Protection clause. Kusper v. Pontikes, 414 U.S. 51 (1973). Political parties are further discussed under article 22.

760. Absence from jurisdiction. All states have procedures that permit those who will be out of town on election day, or who are prevented because of injury or illness from going to the polls, to vote by absentee ballot, either by mail or in person in advance of the election. The requirements and procedures for absentee voting vary considerably from state to state. Although the Equal Protection Clause has not been interpreted to require the states to permit absentee voting, it does prohibit wholly arbitrary distinctions between different classes of absentees. See O'Brien v. Skinner, 414 U.S. 524 (1974) (imprisoned persons who have not been convicted of a disqualifying crime cannot be denied absentee ballots).

761. The Uniformed and Absentee Citizens Absentee Voting Act of 1986 requires the states to permit U.S. citizens living abroad to register for and vote in elections for federal office. 42 U.S.C. sections 1973ff et seq. This Act only enfranchises those who have given up their residence in a state and does not apply to citizens who have never established residency in a particular state. The act guarantees the timely delivery of absentee ballots to all eligible overseas citizens.

762. Criminal conviction and mental incompetence. Most states deny voting rights to persons who have been convicted of certain serious crimes. Where the disqualification on the basis of criminal conviction is motivated by a racially discriminatory purpose, however, the restriction is not permitted. Hunter v. Underwood, 471 U.S. 222 (1985). The standards and procedures for criminal disenfranchisement vary from state to state. In most states, this disability is terminated by the end of a term of incarceration or by the granting of pardon or restoration of rights. However, the Equal Protection

clause of the Fourteenth Amendment does not require the states to re-enfranchise convicted felons who have completed their sentences of incarceration. Richardson v. Ramirez, 418 U.S. 24 (1974).

763. In most states, persons who have been declared by a court to be mentally incapacitated are not permitted to vote. There are procedural safeguards which prevent mistaken or abusive disenfranchisement on this basis.

764. District of Columbia residence. Residents of the District of Columbia, the seat of the federal government established under article I, section 8 of the Constitution, enjoy the same constitutional rights described in this report as any other citizen of the United States. Under the Twenty-Third Amendment to the Constitution, ratified in 1961, residents of the District have the right to vote in elections for President and Vice-President. In addition, under a policy of "home rule", established by Congress in 1973, District residents elect their own mayor, city council, and school board. Congress also established representation for the District through an elected delegate to the House of Representatives. It is in this way that District residents' rights differ from those of the residents of the states.

765. District residents' representation in Congress is limited to this delegate. While under House rules the delegate (as well as each of the representatives of the Insular Areas) may vote at all stages of the legislative process except for final passage, this arrangement remains controversial. While some members of the House have criticized giving the District delegate and the other representatives these extensive voting privileges, some advocates for District of Columbia statehood reject even this arrangement as insufficient.

766. Without question, the framers of the Constitution envisioned the District as a separate enclave, apart from the influences of any state government and responsible to the federal government alone.

> "A dependence of the members of the general government on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonourable to the Government and dissatisfactory to the other members of the democracy."

The Federalist, No. 43, 289 (J. Madison) (J. Cooke, ed. 1961). This status, independent from the states, was reinforced by the choice of a substantially undeveloped section of land, donated by Maryland and Virginia, on which to build the capital city.

767. Despite any early expectations that this status would provide greater stability than one where a single state controlled the District, governance of the District has not remained stable throughout its history, but rather varied in the extent to which Congress, the President, and the residents have chosen who would govern the city. This question remains a topic of active debate within the city, within the rest of the country, and within the government.

768. **Insular areas**. Residents of Guam, the U.S. Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and Puerto Rico do not vote in elections for President and Vice-President. The Twelfth Amendment and Twenty-Third Amendments to the Constitution extend the right to vote in presidential elections to citizens of "States" and to citizens of the District of Columbia. These provisions have been interpreted as not to extend to the Insular Areas. See, Attorney General of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984), cert. denied 469 U.S. 1209 (1985) (residents of Guam not permitted to vote in presidential elections). Residents of these areas do, however, elect their respective local governments. In addition, residents of American Samoa, the District of Columbia, Guam, and the Virgin Islands each elect a Delegate to Congress. Puerto Rico elects a Resident Commissioner. These officials may participate at every level of the legislative process in the House of Representatives except for votes on final passage of a bill. The discussion under article 1 contains further information on the Insular Areas.

769. **Procedural impediments to voter registration**. In 1993, in response to evidence that practical difficulties in registering to vote resulted in depressed rates of electoral participation, Congress enacted the National Voter Registration Act. Pub. L. No. 103-31, 107 Stat. 77. Effective generally on 1 January 1995, the Act requires the states to permit persons to register to vote when they apply for motor vehicle drivers' licences or have interactions with various other governmental agencies, or to register by mail. The Act also limits the circumstances under which a voter's name can be removed from the roll of registered voters. Although the Voter Registration Act applies only to registration for voting for federal offices, the local governmental authorities that are responsible for conducting elections almost invariably maintain a single list of voters eligible to vote in any election that occurs within a geographical area, and thus the act is expected to facilitate voter registration for all elections.

770. **Equality of the vote**. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to require that the votes of residents of different geographic jurisdictions carry equal weight. The one person-one vote rule, which had its origin in Supreme Court cases from the early 1960s, requires districts used for the election of members of the United States House of Representatives, state legislatures, county and city governing bodies and the like to be equal (with some minimal variance permitted) in population. See e.g., Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964). Of course, the one person-one vote rule does not apply to the U.S. Senate, which is composed of two Senators from each state, irrespective of population.

Access to public office

771. In the United States a large number and wide variety of public offices are filled through popular elections, from positions on the governing boards of small villages to President of the United States. In general, anyone eligible to vote is eligible to run for office. For certain public offices, however, there are additional limitations.

772. **Constitutional requirements**. Under the Constitution, only a native-born citizen is eligible to be President. Further, the President must be at least 35 years of age and must have been a resident of the United States for at least 14 years. No person may be elected to more than two 4-year terms as President, or be elected more than once if he or she has served more than two years of a term to which someone else was elected. U.S. Senators must be at least 30 years of age, must have been citizens of the United States for at least 9 years, and must be inhabitants of the state from which they are elected. Members of the U.S. House of Representatives must be at least 25 years of age, must have been citizens for at least 7 years, and must be inhabitants of the state from which they are elected.

773. These are the only limitations on access to public office found in the Constitution. Other limitations have their source in state law, subject to restrictions in the Constitution, such as the Equal Protection Clause of the Fourteenth Amendment, and other federal law.

774. **State and local candidacy requirements**. Candidates for state and local offices may be required to reside in the jurisdiction in which they seek to serve and in the district from which they seek to be elected, and reasonable durational residency requirements are permitted. See e.g. Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), aff'd mem. 414 U.S. 802 (1973). Age requirements vary from state to state; however, requirements that a person be over the age of 30 to hold a particular office are unusual. To hold some offices, many states require that certain educational or experience standards be satisfied.

775. Restrictions on access to public office may apply to persons already holding elected office or who are government employees. The federal Hatch Act, for example, prohibits federal employees from being candidates for public office in partisan elections. 5 U.S.C. section 7321. In some states, limitations have been imposed on the number of consecutive terms of office one can serve. Office holders customarily take an oath of office; however, burdensome loyalty oaths may be struck down as an infringement on First Amendment rights of free speech. See Communist Party v. Whitcomb, 414 U.S. 441 (1974). Where candidates are required to pay filing fees to run for office, an alternative means of qualifying must be made available for those unable to pay the fee. See Lubin v. Panish, 415 U.S. 709 (1974). At the federal level, the Federal Election Campaign Act of 1971 provides money for presidential candidates who have demonstrated sufficient popular support. 2 U.S.C. sections 431 et seq. Additional federal campaign finance reform legislation is under consideration.

776. Finally, in many states and localities, prior criminal conviction will disqualify a person from holding public office.

777. **Access to the ballot**. In general, there are three ways in which a person can qualify to have his or her name on the ballot. Candidates can run as the nominees of major parties, as the nominees of minor parties, or as independents. Rules and procedures vary from state to state, but a major party is generally one that has achieved a certain level of support at a recent election and thus qualifies to have its nominees automatically placed

satisfy a petition requirement, demonstrating some significant level of support, before its nominees will be placed on the ballot. Independent candidates likewise will generally have to demonstrate that they have significant support. Under the Equal Protection clause of the Fourteenth Amendment to the Constitution and under the guarantees of free speech and association of the First Amendment, restrictions designed to limit the number of parties and candidates on the ballot must be reasonable. See Williams v. Rhodes, 393 U.S. 23 (1968) (petition requirement of signatures equalling 15 per cent of votes cast in last election struck down); Moore v. Ogilvie, 394 U.S. 814 (1969) (requirement that signatures come from 50 different counties struck down); Storer v. Brown, 415 U.S. 724 (1974) (restriction on party members running as independents upheld); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (signature requirement higher for local than for state office struck down); Anderson v. Celebrezze, 460 U.S. 780 (1983) (independent candidate filing deadline in advance of major party deadline and far in advance of general election struck down); Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (1 per cent signature requirement upheld). In many jurisdictions, for many offices, a person has the alternative of running as a write-in candidate.

778. **Removal from office**. Article 2, section 4 of the Constitution provides that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanours". Under Article 1, the Senate has the sole power to try impeachments, and the House of Representatives has the sole power to impeach. In addition, each House of the Congress has the power to pass judgement on the qualifications of its members and expel members. Similar procedures are generally available at the state and local level, and there are legal safeguards to protect office holders from abuse of these processes. See Powell v. McCormack, 395 U.S. 486 (1969) (Congress cannot exclude a member who has the qualifications prescribed in the Constitution); Bond v. Floyd, 385 U.S. 116 (1966) (exclusion for the expression of political views violates the free speech guarantee of the First Amendment). Also commonly available at the state and local level is the recall process, by which voters can petition for an election to determine whether an elected official should remain in office.

Access to public service

779. The U.S. Government employs approximately 2,970,000 civilian workers, located in the 50 states and the District of Columbia, of whom some 300,000 are hired annually. With few exceptions, federal employees are selected pursuant to statutes establishing a merit-based civil service system designed to make employment opportunities available to the most qualified applicants through recruitment, hiring, retention and evaluation procedures that are free from considerations of politics, race, sex, religion, national origin, disability and age.

780. The statutory mandate for the federal civil service is as follows:

> "Recruitment should be from qualified individuals from appropriate sources in an endeavour to achieve a workforce from all segments of

society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."

5 U.S.C. section 2301 (b)(1).

781. The federal civil service system has its origin in the Civil Service Act of 1883. Until this Act, it was the practice of the federal government to reward political loyalists with jobs. It was not surprising, therefore, that the primary purpose of this first Civil Service Act was to remove political influence from federal personnel management decisions. The concept of merit selection, that was codified in this Act, remains in effect to this day.

782. Central to the United States' merit-based system is the process of open competition, and today more than half of all federal jobs are filled through such competition. The federal competitive service requires applicants to compete for positions based on a written examination and/or an evaluation of their education and work experience. Once hired, advancement is also competitive and based on performance and merit. Moreover, as a result of the leadership of the federal government and the success of the federal merit system, the great majority of state and local governments, who employ in excess of 15,680,000 civil servants, have adopted similar merit-based employment procedures.

783. The 1978 Civil Service Reform Act created a federal equal opportunity recruitment programme to meet the statute's goal of recruitment from all segments of the workforce. One of the purposes of the Act is to promote "a competent, honest, and productive federal workforce reflective of the nation's diversity". Pursuant to this mandate, special efforts are taken to recruit minorities and women who may be underrepresented in various job categories. Efforts are also made to ensure that the selection procedures themselves are not culturally biased and do not artificially eliminate from consideration otherwise qualified members of underrepresented groups.

784. In addition, the federal civil service and many state and local civil service programmes have taken important steps to protect their employees from political influence. In accordance with the principles of a merit-based civil service, the Hatch Act, passed in 1939, prohibits federal employees from actively participating in partisan politics. Congress determined that partisan political activity must be limited in order for public institutions to perform fairly and effectively. However, the law does not prohibit federal employees from registering, voting, making financial contributions to political candidates, and expressing their personal opinions on political candidates and questions.

785. National policy in this area has also been codified in various federal, state and local civil rights laws. These laws ensure that employment decisions at all levels of government are free from bias based upon race, sex, religion, national origin, disability and age. The laws also provide aggrieved individuals access to impartial and independent tribunals to adjudicate alleged violations of their rights.

786. The policies and protections of the federal, state and local civil service systems offer all Americans the promise of being treated equally in civil service employment. Women and minorities are still overrepresented at the lower levels of pay and authority, but their status in public sector employment exceeds their status in private sector employment. Women constitute 53 per cent of the average total government employees, 50 per cent of state employees, and roughly 59 per cent of federal government workers.

Foreign nationals

787. In general, foreign nationals are not permitted to vote or to hold elected offices in the United States. With certain exceptions for federal officials, the U.S. Constitution does not prohibit political participation by foreign nationals, but the states almost invariably require voters to be U.S. citizens (with a few exceptions for voting in local elections). Nevertheless, there are many ways people participate in politics other than voting and serving as elected officials. These avenues are fully open to non-citizens, and participation by non-citizens is constitutionally protected.

788. The general bar to foreign nationals voting in U.S. elections is not a federal proscription but rather a restriction imposed by state law. This bar has been supported by some who argue that voting is the quintessential right of citizenship and that aliens may be unfamiliar with institutions and values, or that strong ties to their native country may impair their loyalty to the United States and render them incapable of voting responsibly.

789. The right of foreign nationals to participate in public service is less limited than their right to vote in national or state elections. The Supreme Court has held that aliens as a group constitute a "discrete and insular minority" deserving heightened judicial protection in the face of discrimination. Graham v. Richardson, 403 U.S. 365 (1971). Nevertheless, states have the power to require citizenship for "political functions" that go to the heart of representative government, such as elective or important non-elective legislative and judicial positions, and positions involving the formulation of public policy. See Sugarman v. Dougall, 413 U.S. 634 (1973). The general rationale for the "political function" exception is that the composition of state government is a matter firmly within the state's constitutional prerogatives. As democratic societies are ruled by their people, a state may deny aliens the right to vote, or run for elective office, for these lie at the heart of our political institutions.

790. In recent years, the Supreme Court has expanded the scope of the "political function" exception. While the exception was originally interpreted to allow a citizenship requirement only for positions which comprised the core of the representative government system, states have now been permitted to apply the exception to more general public positions. For example, states may require police officers or public school teachers to be citizens, or at least non-citizens who intend to become citizens.

791. In expanding the definition of "political function", the Court reasoned that, as states have the authority to limit the political community, a state may exclude aliens from positions relating to "the right of the people to be governed by their citizen peers", particularly where the position involves

discretionary decision-making or execution of policy. Police officers have substantial discretionary powers in executing state policy, and affect the public to an enormous degree. The Court noted that a state may assume that citizens are "more familiar with and sympathetic to American traditions", which is important if citizens are to submit to such police powers as arrest, search, and seizure. Foley v. Connelie, 435 U.S. 291 (1978).

792. Likewise, in upholding a citizenship requirement for public school teachers, the Court emphasized the importance of education in teaching social and civic virtues and in preparing students to be good citizens. The Court held that furthering educational goals is a legitimate state objective, and that a citizenship requirement for teachers is rationally related to that goal. Ambach v. Norwick, 441 U.S. 68 (1979).

793. Employment of aliens in the federal government is also restricted. Non-citizens cannot be hired for the federal competitive service. They can sometimes be hired for the "excepted" service; the appropriations language for each federal department or agency spells out the countries from which non-citizens can be hired.

Women in government

794. Women's participation in elective office has increased slowly but consistently over the last two decades. Women officeholders set many records on election day, 1992. However, women still do not hold more than about one fifth of the available elective positions at any level of office, including the U.S. Congress, statewide elective executive offices, state legislatures, county governing boards, mayoralties, and municipal and township governing boards.

795. **U.S. Congress**. In 1992, women were elected to fill 47 of the 435 seats in the U.S. House of Representatives (10.8 per cent) in the 103rd Congress. In addition, a woman was elected as the non-voting delegate from the District of Columbia. This represents a significant increase over the previous Congress, which included only 29 female representatives. It is also worthy of note that these women include the first Mexican American woman and the first Puerto Rican woman to serve in the House of Representatives.

796. Six women were elected in 1992 to serve in the U.S. Senate in the 103rd Congress, and a seventh woman was added to the rolls in a 1993 special election in Texas, thereby more than tripling the previous number of women among the nation's 100 Senators. Among these women senators is the first African American woman to win a major party Senate nomination and to serve in the Senate.

797. These 54 women Senators and Representatives account for 10 per cent of the total seats in the 103rd United States Congress. Fourteen, or 26 per cent of them, are women of colour. Ten are African American, one is Asian/Pacific American, and three are Latino.

798. In the 103rd Congress, two of the top congressional leadership positions are held by women. No women chair any standing congressional committees. No woman has yet been Speaker of the House or majority or minority leader of the Senate.

799. **State elective executive offices**. Women made substantial gains at the state level in the 1992 elections. The number of women holding statewide elective executive posts increased four percentage points, from 18.2 per cent (59 women) to 22.2 per cent (72 women).

800. As of 1993, 72 women hold statewide elective executive offices across the country. This figure does not include officials in appointive state cabinet level positions; officials elected to executive posts by the legislature; members of the judicial branch; or elected members of university Boards of Trustees or Boards of Education. Of these 72 women, 4, or 5.6 per cent, are women of colour - one African American, two Asian/Pacific American and one Latino.

801. Currently, 3 of the 50 state governors are women. Eleven women serve as lieutenant governors, 8 women are attorneys general, and women hold statewide elective secretary of state positions in 11 states. Women hold statewide elective state treasurer positions in 17 states.

802. **State legislative offices**. The 1992 election increased the proportion of women in the state legislatures as well as at the national level. In 1993 women constituted 20.4 per cent of the 7,424 state legislators throughout the United States. This is a two percentage point increase in women serving in state legislatures (from 18.4 per cent [1,375 women] to 20.4 per cent [1,517 women]). Women hold 338, or 17.0 per cent, of the 1,984 state senate seats and 1,179, or 21.7 per cent, of the 5,444 state house seats. The number of women serving in state legislatures has increased fivefold since 1969 when 301, or 4.0 per cent, of all state legislators were women.

803. Of the 1,517 women state legislators in office in 1993, 202, or 13.3 per cent, are women of colour. Forty-four are senators and 158 are representatives. African American women hold 151 seats; Asian/Pacific American women hold 18 seats; Latinos hold 27 seats; and Native American women hold 6 seats.

804. **Municipal officials**. In March 1993, 19 of the 100 largest cities in the United States had women mayors; 176 (18 per cent) of the 974 mayors of U.S. cities with populations over 30,000 were women. (These figures include Washington, D.C., but do not include cities from the following states for which data were incomplete: Illinois, Indiana, Kentucky, Missouri, Pennsylvania, Wisconsin). In April 1993, of the 23,729 mayors and municipal council members (and their equivalents) serving nationwide in cities with populations over 10,000, 19.6 per cent were women.

805. **Women appointed to government positions**. With the increased awareness of women as active voters and elected officials has come an increase in the number of women appointed to cabinet-level positions in federal, state, and local government, women judges, and women as members of special advisory

commissions on a wide range of specialized topics. Nevertheless, the systematic inclusion of women at all levels of the planning process in policy making is far from complete.

806. **Judiciary**. As of 1 July 1994, there were 746 members of the federal judiciary of whom 117 were women. Two of the nine U.S. Supreme Court Justices are women. Among members of the lower federal courts, 13 were African American women and 6 were Hispanic women. At the state level, in 1991, 10 per cent of judges on courts of last resort were women, as were 10 per cent of intermediate appellate court judges. According to figures from 1985, women constituted 10 per cent of all state trial court judges.

807. **National executive offices**. Women serve in a number of Cabinet-level positions in the Administration. The first female Attorney General of the United States, Janet Reno, was appointed in 1993. Donna Shalala is the Secretary of Health and Human Services. Hazel O'Leary, an African American, serves as the Secretary of the Energy Department.

808. **Women in public service**. Women represent 48 per cent of the 1.5 million full-time white-collar workers in the executive branch of the federal government; however, they are disproportionately represented at the lower grades, especially in clerical and secretarial jobs. The average woman worker is paid $23,000, while the average man receives $31,000. Limited progress has been made during the past decade on access of women and minorities to policy-making positions. These groups currently comprise approximately 17 per cent of federal government executives; by comparison, in the private sector they comprise less than 10 per cent. None the less, problems remain. According to the recent U.S. Merit Systems Protection Board study, A Question of Equity: Women and the Glass Ceiling in the Federal Government, women in professional occupations are promoted at a lower rate than men in two critical grades, GS-9 and GS-11 (jobs that pay from $26,000 to $42,000). These grades and the categories of professional and administrative occupations are the gateway through which one must pass in moving from the entry level to the senior level.

809. The necessary legal framework exists for a concerted effort to eliminate employment discrimination and to integrate top policy positions in government. Current laws and regulations creating equal employment obligations in government and government contractors include the Civil Rights Restoration Act; the Civil Rights Act of 1991; Executive Order 11246, as amended; and Title IX of the Education Amendments of 1972.

810. A variety of policies, identified over the past 30 years of experience with affirmative action and equal opportunity, have been implemented by various employers to make the workplace gender- and ethnically inclusive, such as integrating responsibility for equal employment into reward structures, paid pregnancy leave, use of sick leave for care of sick dependants, and the creation of firm policies on and sanctions for sexual and racial harassment.

Minorities in government

811. The representation of minorities at all levels of public service has increased significantly in the United States over the past several decades.

None the less, as the following information demonstrates, minority groups of particular concern continue to be underrepresented, particularly at the highest levels.

812. U.S. Congress. Like women, minorities have made significant gains in Congressional representation as a result of the 1992 elections. Although African Americans have served in Congress since Reconstruction, the first African American woman ever to serve in the U.S. Senate was elected in 1992. Also in 1992, the first Native American to serve in the Senate in 60 years was elected. Thirteen African Americans were newly elected to the House of Representatives in 1992, as were six new Hispanic members. By the end of the 103rd Congress, more African Americans and Hispanics will be serving in Congress, 39 and 19 respectively, than ever before. More Asian and Pacific Islanders have also become Members of Congress in the last few years. Both of the current Senators from Hawaii as well as four Representatives and the Delegates from Guam and American Samoa are Asian Americans serving in Congress.

813. Although no minority group members serve in the top Congressional leadership as Speaker of the House or Senate majority or minority leader, African American, Hispanic, and Asian Members serve in leadership posts in the House as chief deputy whips and deputy whips in addition to being chairs of key committees including the House Public Works and Transportation Committee, the House Armed Services Committee, the Senate Indian Affairs Committee, and the Senate Defense Appropriations Subcommittee.

814. Minority group representation in Congress has been supported by the Voting Rights Act and the significant number of majority-African American (32) and majority-Hispanic (20) congressional districts the Act has helped to produce.

815. State legislative and elective executive offices. While the number of minority group members serving in state legislative and executive office has increased, representation does not match their presence in the population. In 1993, the first African American governor of Virginia since Reconstruction finished his term of office. At this time, no minority group member serves as a governor of one of the 50 states. Eight elected state administrators were African Americans and seven elected state executives were Hispanics in 1993. Minorities represented less than 10 per cent of state legislators in 1993, including 520 legislators who were African Americans and 156 legislators who were Hispanics.

816. Municipal officials. Minority group members make significant contributions to local government as mayors and other elected officials. In 1993, more than 350 of the nation's mayors were African Americans as were over 3,500 other municipal elected officials. While information on Hispanic mayors was not readily available, almost 1,500 municipal elected officials in 1993 were of Hispanic origin.

817. Judiciary. As of 1 July 1994, there were 746 members of the federal judiciary of whom approximately 10 per cent were members of a minority group. In addition to one African American Supreme Court Justice, 60 African Americans served on the lower federal courts, with 35 Hispanics, 5 Asian

Americans, and 1 Native American. At the state court level, 12 African Americans served on a state supreme court in addition to more than 580 in other judicial offices. More than 630 Hispanics served in judicial offices in 1993.

818. **National executive offices**. A number of minority group members served as Cabinet secretaries and at other senior levels of the Administration. Cabinet officials include Commerce Secretary Ronald Brown, Energy Secretary Hazel O'Leary, Housing and Urban Development Secretary Henry Cisneros, Transportation Secretary Federico Pena, and Veteran's Affairs Secretary Jesse Brown.

819. **Minorities in public service**. More than 600,000 of the 3 million federal government employees are minority group members. These include more than 480,000 minorities in white-collar jobs. Of these employees, approximately 290,000 are African Americans, 94,000 are Hispanics, 65,000 are Asians, or Pacific Islanders, and 34,000 are Native American. The average annual white-collar salary for all white-collar workers in the federal government in 1993 was approximately $36,000. Members of minority groups earn less on average. African Americans earned an average of approximately $29,000, Hispanics $32,000, Asians and Pacific Islanders $37,000, and Native Americans $28,000. A significant legal framework of statutes and executive orders serves to protect minority rights and encourage minority advancement in the federal workforce as discussed in the section on Women in Government.

Article 26 - Equality before the law

820. As indicated in the discussion of the previous 25 articles, all persons in the United States are equal before the law. Subject to certain exceptions, such as the reservation of the right to vote to citizens, they are equally entitled to all the rights specified in the Covenant.

821. In addition, as discussed at length under article 2, all persons in the United States enjoy the equal protection of the laws. Any distinction must at minimum be rationally related to a legitimate governmental objective, and certain distinctions such as race can be justified only by a compelling governmental interest, a standard that is almost never met.

822. **U.S. understanding**. Because not all distinctions are absolutely prohibited under the U.S. Constitution and U.S. laws, the United States stated the following understanding in ratifying the Covenant:

> "That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective."

Article 27 - The rights of minorities to culture, religion and language

823. **Religion and culture**. As discussed under article 18, the U.S. Constitution guarantees the right of all persons, members of minority groups or otherwise, to practise their own religion. The right to practise one's own culture, although not an explicit constitutional guarantee, is also embodied in the protection of civil and political rights in the U.S. Constitution. For example, the guarantee to practise one's culture is a subset of religious freedom, where religion is determined by culture. The issue of culture may be an element of self-determination, as political status and the pursuit of social and economic development often reflects cultural values. Further, the issue is related to the freedoms of association and assembly. Finally, the issue can encompass freedom of expression, opinion, thought, and conscience, where one chooses to express cultural beliefs and traditions.

824. **Linguistic freedom**. The First Amendment to the Constitution guarantees all persons in the United States the right to converse or correspond in any language they wish. Virtually every major language or dialect is spoken somewhere in the U.S., and there are no restrictions on the use of foreign language in the print or electronic media.

825. Although there is no official language in the United States, 19 States have passed statutes, constitutional amendments, or resolutions declaring English to be the official language of the state. The exact impact of these enactments is not yet settled or clear. One federal court struck down a local law requiring one half the space of a foreign language sign to be devoted to English alphabetical characters. Asian American Business Group v. City of Pomona, 716 F. Supp. 1328 (C.D. Calif. 1989); another invalidated as too broad under the First Amendment a state constitutional amendment requiring state employees to speak English while performing official duties, Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990). As for the private settings, a U.S. court recently ruled that employers may enact rules requiring English to be spoken in the workplace. Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (holding that plaintiffs failed to meet disparate-impact standards and establish a prima facie showing of discrimination where certain assembly-line workers were required to converse in English).

826. In the field of education, however, the U.S. Supreme Court has articulated clear protections for linguistic minorities. In 1974, the Court concluded that under Title VI of the Civil Rights Act of 1964, language minority students are entitled to educational opportunities equal to those of other students. Lau v. Nichols, 414 U.S. 563 (1974). Accordingly, schools are required to conduct programmes which meet the needs of their language minority students. In addition, the Bilingual Education Act, administered by the Department of Education, provides assistance to schools and other eligible grantees in the development and support of instructional programmes for students with limited English proficiency. The Act also supports the collection of data on the number of limited English proficient persons in the United States and the educational services available to them, the evaluation of the effectiveness of programmes under the Act, research on improving those programmes, and the training of teachers and other educational personnel to provide educational services to limited English proficient students.

827. Under the Voting Rights Act, the federal government and the states are required to provide multilingual election services for all elections in those jurisdictions in which persons with limited English proficiency constitute more than 5 per cent of the voting age population.

828. As a requirement for naturalization as a U.S. citizen, applicants are required to demonstrate an understanding of the English language including an ability to read, write, and speak words in ordinary usage in the English language. 8 C.F.R. section 312.1. Exceptions are provided for persons physically unable to take an English literary test - such as blind or deaf persons - and long-time residents of the U.S. over a certain age. Persons exempt from the literacy test or who have passed the literacy test but who cannot take the United States history/government exam in English may employ an interpreter in their native language.

829. **Protection of Native American culture**. The fundamental civil and political rights discussed elsewhere in this report are generally sufficient to ensure that members of minority groups have the right to practise their own culture. In the case of Native Americans, however, additional special protections have been thought warranted in view of their particular circumstances. Accordingly, the protections afforded by article 27 are strongly implicated in principles of Native American self-governance discussed with regard to article 1. Policies adopted by the United States over the last 60 years, and particularly in the last 25 years, have sought to protect Native American linguistic, religious and cultural freedoms.

830. Religious freedom. Historically, policies of the federal government did not favour the practice of Native American religions. Beginning in the 1930s, however, the Bureau of Indian Affairs began to remove restraints on Indian religious practice. In 1962, recognizing the importance of eagle feathers to Native American religions, Congress amended the Bald and Golden Eagle Protection Act of 1940 to provide an exception for the taking of bald eagles for Native American religious purposes. 16 U.S.C. section 668a.

831. In 1968, Congress enacted the Indian Civil Rights Act (ICRA), which requires Native American tribes to respect the civil rights of persons living in their jurisdictions. 25 U.S.C. sections 1301-03. Among other things, the ICRA provides that "[n]o Indian tribe in exercising its powers of self-government shall ... make or enforce any law prohibiting the free exercise of religion ...". 25 U.S.C. Section 1302.

832. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. section 1996, which requires the federal government to respect and promote the religious rights of Native Americans. Recognizing that Native American religions had often been misunderstood or disregarded by the majority culture, AIRFA established the following policy for the United States:

> "... to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native

Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."

42 U.S.C. section 1996.

833. As discussed under article 18, the right to free exercise of religion in the United States is not absolute, and the government is not required to accommodate the religious practices of all persons in every instance. Accordingly, the U.S. Supreme Court has found that Native American religious rights are not unqualified, but must be appropriately balanced against other public and private rights and interests. For example, in Lyng v. Northwest Indian Cemetery Protective Ass'n, the Court held that the federal government could not be prohibited from building a timber road across federal lands, which had traditionally been considered sacred for purposes of Native American religious practices. In reaching this decision, the Court found that AIRFA did not establish judicially enforceable rights. 485 U.S. 439 (1988). Two years later, the Court upheld a generally applicable state law which effectively prohibited the use of peyote by Native American Church practitioners. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, reh'g denied 496 U.S. 913 (1990).

834. As discussed under article 18, disapproving of the Smith decision on peyote, the U.S. Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. section 2000bb, which seeks to guarantee application of the "compelling interest" test in free exercise cases. It remains to be seen how the rights of Native Americans to believe, express, and exercise their traditional religion, including access to sacred sites, use and possession of sacred objects such as peyote and eagle feathers, and the freedom to worship through ceremonial and traditional rites, will be affected by this legislation.

835. The Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, 25 U.S.C. sections 3001-13, requires federal agencies and federally-funded museums to inventory their holdings of human remains, funerary and sacred objects, and objects of cultural patrimony. The agencies and museums must work with Native American tribes and Native Hawaiian organizations to reach agreements on the repatriation or other disposition of these remains and objects. The Act also protects Native American burial sites and controls the removal of objects on federal, Indian, and Native Hawaiian lands.

836. Native languages. Scholars estimate more than 600 Native American languages were spoken in North America prior to contact with the Europeans. In 1991, 187 of the 600 remained as "living" languages. However, only 38 of these languages were being taught to children in organized educational programmes.

837. Congress addressed the issue of native languages in the Native American Languages Act of 1990, 25 U.S.C. sections 2901, et seq. The Act contains the following legislative findings:

"(1) the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages ... (3) the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic integral part of their cultures and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values ... (8) acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans ... (9) languages are the means of communication for the full range of human experiences and are critical to the survival of cultural and political integrity of any people. ..."

838. The Act provides that the right of Native Americans to express themselves through the use of native languages shall not be restricted in any public proceeding, including publicly supported education programmes, and requires the President to direct the heads of federal agencies to evaluate their policies and procedures in order to determine and implement or propose changes needed to preserve, protect and promote native languages. 25 U.S.C. sections 2904-05.

839. The Indian Native Languages Act of 1992, 42 U.S.C. sections 2991, et seq., gives grant authority to the Secretary of the Department of Health and Human Services to award grants to eligible organizations that establish language projects bringing younger and older Native Americans together, to train native speakers to teach others, to develop materials, to produce television and radio programmes in Native American languages, to record and preserve Native American languages and to purchase equipment.

840. Arts and crafts. In 1990, the Indian arts and crafts industry was estimated to have a market value of $400 to $800 million annually. It was also estimated that $40 to $80 million is lost annually by unmarked imitations, imported and domestic. As much as 50 per cent of items sold as authentic Zuni, Navajo and Hopi designs, many of which are religious symbols, were in fact imported.

841. The 1990 Amendments to the Indian Arts and Crafts Act, 25 U.S.C. sections 305, et seq., provide Native Americans with legal recourse against imitations of arts and crafts, including jewellery, beadwork, pottery, baskets, and other items, being marketed as "Indian Made". In addition, the Act allows Native American tribes to certify artists who are members of the tribe or who are otherwise linked to the tribe. Also, the Act established a Board whose mandate is to promote the development of Indian arts and crafts and to assist Native American tribes in the development of a framework to support the "preservation and evolution" of tribal cultural activities.

842. Education. Throughout the first half of the nineteenth century, the federal government provided only limited educational services to Native Americans, leaving educational programmes to tribes themselves and to Christian religious organizations. Beginning in the 1870s, federal

educational services were greatly expanded. The focus of these services was on assimilation and education to suppress aboriginal ways. Off-reservation boarding schools were established to educate and promote assimilation among the Indians. Students who attended federally operated boarding schools and day schools were forbidden to speak their own language, forced to cut their hair, and disciplined to reject their Indian cultures and heritage in line with the policy of assimilation.

843. Federal policy shifted somewhat during the 1930s, as the Bureau of Indian Affairs (BIA) adopted curricular policies that sought to relate the instruction in Bureau schools to the needs and interests of the children with an emphasis on community day schools rather than boarding schools. Enrolment in off-reservation boarding schools decreased.

844. At the same time, the federal government began to encourage attendance of Native American students in public schools. The Johnson-O'Malley Act of 1934, 25 U.S.C. sections 452-57, provided for federal-state cooperation in funding the education of Indian students who attended public schools. In the 1950s, many BIA schools were closed as part of the general policy of termination.

845. As of 1993, 43,700 students are enrolled in grades K through 12 basic instruction programmes operated by the Bureau of Indian Affairs or by tribes under BIA contracts or grants. This represents about 11 per cent of Indian students enrolled in elementary and secondary programmes in the United States. Another 245,102 Native American students attend public schools that receive funds from the BIA under the Johnson-O'Malley Act. Under BIA regulations, these funds are to be used to meet the specialized and unique educational needs of eligible Native American students. 25 C.F.R. 273.1 (1992).

846. In 1978, Congress enacted legislation to provide for greater Native American control over education in BIA schools. 25 U.S.C. sections 2001-19. The legislation calls for minimum academic and dormitory standards or alternative tribal standards, a standardized formula to determine the minimum annual funding necessary to sustain each government-operated and tribally operated contract school, a process for renovating and repairing Indian school facilities, and a more flexible personnel system for educators and staff employed in government and tribal schools.

847. In 1988, the Tribally Controlled Schools Act of 1988, 25 U.S.C. sections 2501-11, set forth findings that the federal administration and domination of the contracting process in Indian education matters under the Indian Self-Determination Act had not provided Indian people leadership opportunities or an effective voice in planning and implementing of programmes for the benefit of Indians. To remedy these concerns, the statute offered tribes and tribal organizations the option to receive grants for the total operation of tribal schools. Under these grants, tribes or tribal organizations are given total tribal control of funds and personnel, limited federal reporting requirements, and the ability to invest federal funds received under this programme for the schools' benefit.

848. Indian child welfare. In 1978, Congress passed the Indian Child Welfare Act, 25 U.S.C. sections 1902, et seq., to promote the placement of Native American children in foster and adoptive homes reflective of their unique

cultural environment and heritage. The policy was designed to increase involvement by tribal governments and other Native American organizations in the planning and delivery of child welfare-related services, and as a result, there has been a significant increase in child welfare personnel who are familiar with tribal customs and values.

849. The Act resolves conflicts between federal, state and tribal governments in such a way that tribal governments have primary jurisdiction over the placement of Native American children. The Act vests initial authority for Native American child placements with tribal courts and provides that full faith and credit be accorded to the laws and court orders of Indian tribes in child placement matters. The statute also authorizes the federal government to provide grants to tribes and tribal organizations to establish tribal codes and family development programmes on and off Native American reservations.

Annex I

ABBREVIATIONS

ACA: American Corrections Association

BHRHA: Bureau of Human Rights and Humanitarian Affairs

BIA: Board of Immigration Appeals or Bureau of Indian Affairs

BOP: Bureau of Prisons

CCC: Community corrections centres

CFR: Code of Federal Regulations

Cir.: Circuit

cl.: clause

DOD: Department of Defense

DOJ: Department of Justice

F. Supp.: Federal Supplement

F.2d: Federal Reporter Second Edition

FEMA: Federal Emergency Management Agency

F.R.: Federal Register

Fed. R. Civ. P.: Federal Rules of Civil Procedure

Fed. R. Crim. P.: Federal Rules of Criminal Procedure

GDP: Gross Domestic Product

ICC: Indian Claims Commission

INS: Immigration and Naturalization Service

IRCA: Immigrant Reform and Control Act of 1986

N.E.2d: Northeastern Reporter second edition

N.W.2d: Northwestern Reporter second edition

P.2d: Pacific Reporter second edition

Pub. L. No.: Public Law Number

S.Ct.: Supreme Court Reporter

UCMJ: Uniform Code of Military Justice

U.S.: United States Reporter

U.S.C.: United States Code

Annex II

GLOSSARY

appearance bond: type of bail bond required to insure presence of defendant in criminal case

arraignment: procedure whereby accused is brought before the court to hear crime with which he is charged and to plead guilty or not guilty

bail: in a criminal case, surety provided to obtain release of person under arrest; surety, frequently money, is retained by the court if defendant fails to appear at designated future time in court or leaves the jurisdiction of the court

bail bondsman: one who is in the business of providing surety bail bonds for arrested persons

boot camp: usually a training camp for military personnel; with regard to convicted criminals, "boot camp" is used to describe alternative to traditional incarceration in which prisoners live, work, and train in an environment similar to military boot camps

breach: the breaking or violating of a law, obligation, engagement, or duty, particularly "breach of contract" or the breaking of one's contractual obligations

burden of proof: the necessity or duty of one party to affirmatively prove a fact in dispute; the obligation of a party to establish by evidence the requisite degree of belief concerning a fact in the mind of the trier of fact or the court

cert. denied: refusal by the United States Supreme Court to grant a writ of certiorari: e.g., to hear a case

citizen: one who under the Constitution and laws of the United States, or of a particular State, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights including all persons born or naturalized in the United States

Code of Federal Regulations (C.F.R.): the annual cumulation of federal executive agency regulations including those published in the daily Federal Register and regulations issued previously; contains the general body of regulatory or administrative law

commonwealth: the official title of certain political units which have a self-governing, autonomous, voluntary relationship with a larger political unit

complaint: in criminal cases, a written statement of the essential facts supporting a claim that a named (or unnamed) person committed a crime; a complaint must be made before a magistrate and if the magistrate finds that probable cause exists that the named person committed the alleged crime, a warrant for his arrest is issued

contempt of court: any wilful act disregarding or disobeying a court in its administration of justice, including acts calculated to lessen the dignity of the court as well as violations of lawful court orders

court martial: a military court; to bring an individual before a military court

custody: the care or control of a thing or person including the custody of a child which may be ordered by a court as part of a divorce or separation proceeding

de novo: anew, afresh, a second time

deposition: the testimony of a witness taken upon interrogatories, not in open court, that is reduced to a writing and duly authenticated; a discovery device by which one party asks oral questions of another party or a witness for the other party; may be used in a civil or criminal trial

discretionary relief: relief which is not a matter of right but rather of discretion

et seq.: an abbreviation meaning "and the following"

ex post facto: after the fact; an "ex post facto law" provides for punishment of a person for an act which when committed was innocent

Federal Register: daily publication making available to the public, often for comment, federal agency regulations and other executive branch documents

Federal Rules of Civil Procedure: body of procedural rules which govern all civil actions in U.S. District Courts

Federal Rules of Criminal Procedure: body of procedural rules which govern all criminal proceedings in U.S. District Courts and where specified before U.S. magistrates

felony: a grave or serious crime, frequently any offence punishable by death or imprisonment for more than one year

first degree: phrase used to describe the most serious of a type of crime as in first degree murder

grand jury: a jury of between 12 and 23 people (16 and 23 in federal court) impanelled to receive complaints in criminal cases, hear the State's evidence, and issue indictments where probable cause exists to bring a case to trial

halfway house: loosely structured institution designed to rehabilitate persons, particularly by assisting former prisoners in the transition from prison to civilian life

immunity: exemption from performing duties the law usually requires including exemption from prosecution usually in exchange for offering inculpatory evidence against another individual

in absentia proceeding: proceeding conducted in the absence of usually a defendant in a case

indictment: written accusation by a grand jury to the court charging a person with doing an act or being guilty of an omission which by law is a public offence

informed consent: a person's agreement to allow something to happen where the agreement is based on a full disclosure of facts needed to make the decision intelligently including facts regarding risks and alternatives

injunction: a prohibitive, equitable remedy, issued or granted by a court forbidding a party to do some act or restraining a party from continuing some act

jail: a building used for the confinement of persons held in lawful custody usually persons either convicted of misdemeanours or persons awaiting trial

jury of one's peers: jury composed of defendant's fellow citizens

magistrate: in federal court a judicial officer appointed by the judges of federal district courts having some but not all the powers of a judge; magistrates usually conduct many of the preliminary or pre-trial civil and criminal proceedings

mandamus: a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board, corporation, or person to perform a particular act specified and belonging to his public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived

material witness: a person who can give testimony that no one or almost no one else can give, such as a victim or an eyewitness

misdemeanour: an offence other than a felony, usually one that results in a fine or short imprisonment in a jail

motion: an application to a court or judge in order to obtain a ruling or order in favour of the applicant

nationals: persons - including but not limited to citizens - who owe allegiance to a country

parole: release from jail, prison, or other confinement after having served some portion of the sentence, usually is conditional and may be revoked upon violation of any of the conditions

perfect the appeal: to complete or finish an appeal such that it may be submitted to the court

petit jury: the ordinary jury of usually between 6 and 12 persons who decide questions of fact in civil and criminal trials; "petit" distinguishes this jury from "grand" jury

preliminary hearing: hearing by a judge or magistrate to determine whether a person charged with a crime should be held for trial; held in felony cases prior to indictment; requires the State to establish probable cause that a crime was committed and the defendant committed it

prison: a building used for the confinement of persons usually convicted of more serious crimes, such as felonies; synonym is penitentiary

probable cause: reasonable cause for belief; more evidence for than against; a reasonable ground for belief in the existence of facts warranting the proceedings complained of (such as warrant, indictment, arrest)

probation: a sentence releasing a prisoner into the community under the supervision of a public officer (probation officer)

restitution: act of making good or giving equivalent for any loss, damage, or injury suffered; puts plaintiff in the position he would have been in if no action had occurred

second degree: phrase used to describe a lesser crime among a type of crimes as in second degree murder

See: citation signal indicating that the following supports the proposition stated

State action: phrase used usually in due process and civil rights claims where a private citizen claims improper governmental intrusion in his life

subpoena: command to appear at a certain time and place to give testimony upon a certain matter

summary judgment: motion of a party in a civil action requesting the court to find that there is no genuine issue of material fact and the party is entitled to prevail as a matter of law

supra: above; usually directs the reader to a previous citation
territory: the land and waters under the jurisdiction of a State, nation, or sovereign

tort: a private or civil wrong or injury other than a breach of contract for which the court will provide a damages remedy

warrant: a written order on behalf of the State based upon a complaint that directs a law enforcement officer to arrest a person and bring him before a magistrate

whistleblower: person, usually within an organization such as a business or the government, who reports fraud or other offence occurring within the organization

writ of habeas corpus: an order requiring a party to be brought before the court; usually used to test the legality of the detention or imprisonment of a person

writ: an order issued by a court requiring the performance of a certain act

Annex III

RATIFICATION OF THE COVENANT BY THE U.S. SENATE

SENATE OF THE UNITED STATES

IN EXECUTIVE SESSION

2 April 1992

Resolved, (*two thirds of the Senators present concurring therein*), That the Senate advise and consent to the ratification of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, and signed on behalf of the United States on 5 October 1977, (Executive E, 95-2), subject to the following Reservations, Understandings, Declarations and Proviso:

I. The Senate's advice and consent is subject to the following reservations:

(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age.

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, colour, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in Articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to "exceptional circumstances" in paragraph 2 (a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3 (b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defence. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understand that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the

Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.

(4) That the United States declares that the right referred to in Article 47 may be exercised only in accordance with international law.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Attest: Walter J. Stewart
Secretary